

CCRC

Criminal • Cases • Review* Commission

CRIMINAL APPEAL ACT 1995

FINAL STATEMENT OF REASONS FOR A DECISION NOT TO MAKE A REFERENCE TO THE COURT OF APPEAL

CCRC Reference:	00557/2006
Applicant:	Jack Whomes HMP Whitemoor Longhill Road March Cambridgeshire PE15 0PR
Applicant's Representatives:	Christopher Bowen Wells Burcombe Solicitors 5 Holywell Hill St Albans Hertfordshire AL1 1EU

In the exercise of its powers under the Criminal Appeal Act 1995 ("the Act") the Criminal Cases Review Commission ("the Commission") has considered the application of Mr Whomes for review of his conviction.

The Commission has decided not to refer Mr Whomes' conviction to the Court of Appeal.

Details of Conviction and Sentence

Date:	20 January 1998
Court:	The Central Criminal Court
Offence	Sentence

Conspiracy fraudulently to evade the prohibition on the importation of a class B drug, namely cannabis.	8 years' imprisonment (concurrent)
Murder x 3	Life Imprisonment x 3

Summary

- i. The Commission may refer a conviction to the Court of Appeal only if there is a real possibility that the conviction will be overturned. The reference must be based on some new evidence or argument that was not raised at trial or appeal, unless there are exceptional circumstances.
- ii. Further details of the Commission's powers are outlined in Annex A.
- Hi. Mr Whomes was notified on 11th October 2010 of the Commission's provisional view that there was no real possibility that this conviction would be overturned. Mr Whomes was initially given until 6th December 2010 to make further submissions to the Commission. Save only for minor typographical and other corrections, paragraphs 1 - 195 of this document are identical to paragraphs 1 - 195 of the Provisional Statement of Reasons issued by the Commission on 11th October 2010
- iv. The Commission received further submissions on diverse dates between 26th January 2011 and 20th July 2011. Having considered both the initial and further submissions the Commission has decided not to refer the conviction to the Court of Appeal. The Commission's decision is explained in the "Analysis and Reasons" and "Further Analysis and Reasons" sections of this Statement of Reasons.
- v. The position in relation to disclosure of material is set out in Annex B.

The Trial

This section summarises the background to the case and the evidence and arguments put forward by the prosecution and defence at trial. For the most part, it has been taken from the Commission's previous Statement of Reasons on the referral of Mr Whomes' conviction to the Court of Appeal. It does not necessarily reflect the Commission's view of the evidence or arguments put forward at trial, or indeed the applicant's assessment of the evidence or arguments as presented to the Commission.

Background

1. Mr Whomes faced trial with two co-defendants, Michael Steele and

Peter Corry, on an indictment with five counts. Count 1, to which all three men were defendants, alleged that they had conspired to import cannabis. Counts 2, 3 and 4 related to the murders of three men, Patrick Tate, Anthony Tucker and Craig Rolfe. Mr Whomes and Mr Steele were charged with the murders but Mr Corry was not. Count 5 related to the possession, as a prohibited person, of a shotgun. Mr Steele was the only defendant to this charge.

The prosecution case

2. The Crown's case in relation to all the counts relied very heavily on the evidence of Darren Nicholls. He was an accomplice to the importation of drugs and was involved in the events surrounding the murders. By consent, the jury was directed to take account of his criminal character and his admitted involvement in the importation of controlled drugs. The jury were directed that in giving evidence for the Crown, Mr Nicholls may well have had an interest of his own to serve in seeking to obtain some lesser sentence than would otherwise be the case. He had lied in his third interview with the police. Mr Nicholls had previously pleaded guilty to, and was awaiting sentence upon, four counts on an indictment relating to the importation of drugs, the sale of a firearm and the possession of drugs.
3. Mr Nicholls said that in 1992 he had been imprisoned for counterfeiting offences. Whilst in prison he befriended the defendants, Mr Steele and Mr Whomes. In 1993, Patrick Tate moved to the same prison; Mr Nicholls and Mr Steele already knew him. Mr Nicholls said that he subsequently contacted Mr Steele and Mr Tate when they had all been released from prison, in 1994. After they had been released, Mr Nicholls had come to dislike Mr Tate and they had no longer been on speaking terms. Mr Nicholls carried out some electrical work at a house in Clacton that belonged to Mr Steele's mother. Around this time, Mr Nicholls said, he began to sell cannabis resin for Mr Steele. He also did some work for Mr Steele in Brightlingsea, where he, Steele, had a rigid inflatable boat (RIB). Mr Nicholls thought that Mr Steele also disliked Mr Tate.

Drug smuggling

4. Mr Nicholls gave evidence in relation to several trips abroad that he made with Mr Steele, Mr Whomes, Mr Corry and others. The first trip was on 15th August 1995. He collected Mr Steele and Mr Corry, and they went together in a car via the ferry at Felixstowe to Amsterdam. There they met a man named Stone, who agreed to sell them a quantity of drugs. They left the money with Mr Stone and returned to the UK.
5. Mr Nicholls and Mr Corry returned to Amsterdam a few days later to collect the drugs. They went by car via the ferry to Ostend in Belgium. When they left Amsterdam, they telephoned Mr Steele in

the UK. They arranged to meet Mr Steele on the coast near Blankenberge; Mr Steele travelled from the UK in his RIB. When Mr Steele arrived, Mr Nicholls and Mr Corry carried the drugs down the beach and loaded them onto the boat. Mr Steele and Mr Corry returned to the UK in the boat. Mr Nicholls telephoned Mr Whomes to tell him that the boat was on its way back before returning to the UK by car via Calais. He was subsequently paid in drugs by Mr Steele for his part in this importation.

6. Mr Nicholls said that on 3rd October 1995, he and another man, Francis Read, went to Amsterdam, crossing the Channel by ferry from Felixstowe to Zeebrugge. Mr Nicholls said that Mr Read did not know at the outset that the purpose of the trip was to purchase and smuggle cannabis. Mr Nicholls bought cannabis from Mr Stone. He then met Mr Steele on the coast near Blankenberge. The boat was again loaded with the drugs. Mr Nicholls said that he was then told by Mr Steele that he would be returning with him, Steele, on the boat. Mr Read returned to the UK by ferry. Mr Nicholls said that the crossing in the boat was difficult; the sea was rough and the fuel tank on the boat split. They landed at Point Clear, in Essex, where they were met by Mr Whomes. Mr Nicholls was again paid in drugs for his part in this importation.
7. On 7th November 1995, Mr Nicholls again went to Holland with Mr Corry. This importation involved the purchase of drugs to the value of £125,000. The money came from various sources, including Patrick Tate. Mr Nicholls said that he had collected Mr Corry from Mr Steele's house, where the cash for the purchase was being counted. They travelled from Harwich to Amsterdam as foot passengers, and later hired a car in Amsterdam. They handed the money to Mr Stone and then met him to collect the drugs. They drove to the same beach near Blankenberge. Mr Steele picked up the drugs in the boat. Mr Corry returned to the UK with Mr Steele in the boat. The following day, Mr Nicholls returned to the UK through Harwich. Mr Nicholls said that he subsequently learnt from Mr Steele that he, Steele, Mr Whomes and

Mr Corry had been arrested by the police and customs officers when Mr Steele had landed at Point Clear. The boat had been searched but nothing was found because the drugs had already been offloaded. The three men had been questioned and released.

8. Mr Steele took Mr Nicholls to where the drugs had been stored and gave him several kilograms to sell. Mr Nicholls passed the drugs on to dealers but they returned them to him, saying that the cannabis was of very poor quality and was unsaleable. Mr Steele said that he had heard the same thing from other people to whom he had supplied the drugs. Mr Steele contacted Mr Stone, who apologised and said that they had been given the wrong batch, although a third

of the drugs were of good quality. He agreed to refund the money if the drugs were returned.

9. On 15th November 1995, Mr Nicholls went with Mr Steele to Amsterdam to collect the money. Mr Stone initially gave them £30,000, and they agreed to wait whilst he obtained the rest of the refund. They stayed overnight in the Delta Hotel. On 17th November, Mr Stone provided them with a further 80,000 guilders, which Mr Steele accepted. Mr Steele was concerned about carrying large amounts of currency back into the UK and made telephone calls to persuade Mr Tate, Mr Whomes and others to travel to Ostend to help take the money back. Mr Steele met Mr Tate and two women and gave them some of the money. Mr Whomes came over in a van and took the guilders back to the UK. Mr Steele and Mr Nicholls returned to the UK by jetfoil. Mr Steele told Mr Nicholls to dispose of the cannabis, and he did so by throwing it in the sandpits at Braintree.
10. The Crown adduced evidence to corroborate the account given by Mr Nicholls regarding the trips to Holland. There was evidence to show that a call had been made from a bar near the beach in Blankenberge to Mr Whomes' mobile telephone, as Mr Nicholls had claimed. The ferry tickets in relation to the trip with Mr Read were paid for on Mr Nicholls' credit card and booked in Mr Read's name. There was an entry in an Amsterdam hotel register showing that Mr Nicholls had stayed there on the night of 7th November and again from 15th-17th November. There was a booking in Mr Steele's name for a hotel in Ostend. The sandpits at Braintree were searched and blocks of cannabis resin were found.
11. Barry Dorman, a business associate of Mr Tate's, gave evidence that he had gone to Ostend with him to collect money. Craig Rolfe and Tony Tucker had also gone with them as had some of their girlfriends.
12. Evidence was given as to the arrests of Mr Steele, Mr Whomes and Mr Corry on the night of 7th/8th November. In the early hours of the morning, police officers saw a Range Rover with a trailer and an RIB attached. Mr Whomes spoke to the officers and said that he had been diving. Mr Corry and Mr Steele appeared and began to do some work on the boat. Officers of HM Customs and Excise arrived and arrested Mr Steele, Mr Whomes and Mr Corry on suspicion of importing drugs. The boat was searched but nothing of significance was found. It was taken away for examination and a very small piece of cannabis resin, weighing about one quarter of a gram, was found.
13. The three men were interviewed. Mr Steele and Mr Whomes refused to answer any questions. Mr Corry said that he had been out with Mr Steele to help him test the boat and its on-board computer. The

boat, he said, had broken down on a number of occasions. The three men were released without charge.

The murders

14. Mr Nicholls said that on a number of occasions prior to the murders, Mr Steele had asked him if he could get hold of a gun. On 6th December 1995, he had spoken to Mr Steele on the telephone a number of times. He met him by arrangement at around 5:00 pm. Mr Whomes was also present. Mr Steele said that he was going to collect some others and bring them to a place where a drug deal was to take place. Mr Whomes and Mr Nicholls went in a Volkswagen Passat to the car park of the Halfway House pub where Mr Steele was already parked in his Toyota Hi-Lux. They watched and saw a Range Rover arrive and park next to Mr Steele's vehicle. Mr Whomes said that Mr Tate was in the Range Rover. Mr Whomes then told Mr Nicholls to drive to Rettendon and turn off the road on a farm track to the right. Mr Whomes got out of the car there, taking a canvas bag with him. Mr Whomes told Mr Nicholls to wait for his telephone call and then come back and get him.
15. Mr Nicholls drove off to another pub to wait but could not obtain a good signal on his mobile telephone there, so he drove back past where he had dropped off Mr Whomes and parked in Rettendon. Mr Whomes telephoned and said, "Come and get us". Mr Nicholls returned to the farm track and Mr Whomes and then Mr Steele got into the car. Mr Whomes was wearing plastic gloves which appeared to be speckled with blood. Mr Steele told Mr Nicholls to drive off, which he did. Mr Steele said, "They won't fuck with us again", and Mr Nicholls assumed from this that someone had been killed. He saw Mr Steele pass over parts of a shotgun to Mr Whomes. Mr Steele described Mr Whomes as cold-hearted because Mr Whomes had handed Mr Steele a gun, and then Mr Whomes had immediately shot all three men in the Range Rover.
16. Mr Nicholls said that he learnt of the identity of the other two victims from the news. Mr Steele told him some time after the murders that the three men had been tempted to the scene by a story of a cocaine deal. The cocaine was to be imported by plane. Mr Steele told him that the gun had been ground up and thrown into the sea. Mr Steele said that Mr Tate had borrowed some money from two brothers to buy the drugs and failed to repay it. He had told the brothers that Mr Steele had not repaid him. Mr Steele had heard that Mr Tate had planned to deliver him to the brothers and to shoot him in front of them.
17. A few days after the murders, Mr Nicholls had been offered a shotgun and had agreed to buy it. He passed it on to Mr Steele. A shotgun was later found by police, hidden in the loft at Mr Steele's house.

18. The bodies of the three victims were discovered in the Range Rover by two local farmers at around 7:45 on the morning of 7th December 1995. A forensic scientist gave evidence that he believed that eight shots had been fired. Seven cartridge cases were recovered, all of which had come from the same weapon.
19. The Crown adduced evidence of telephone calls made between the telephones belonging to the parties from August 1995 until after the murders. Evidence was given regarding the location of mobile telephone transmitters and the routing of calls on the day of the murders ("cell site" data). Two calls were made from Mr Whomes' mobile telephone to Mr Nicholls' mobile telephone at 18:59. One call lasted only one second, indicating a poor signal. It was the Crown's case that the calls were made from the vicinity of Workhouse Lane, the site of the murders. The Crown brought forward evidence to show that the second call at 18:59, which lasted four seconds, was routed through a transmitter sited at Hockley, and that this was consistent with the call having been made in the Workhouse Lane area.
20. The Court heard evidence in relation to the mobile telephones of two of the victims, Patrick Tate and Anthony Tucker. The billing data for those telephones showed that the last calls they made were at 17:07 (Tucker mobile; lasting two minutes and nine seconds) and 18:26 (Tate mobile; lasting 26 seconds). The billing data for Mr Tucker's mobile showed that a number of incoming calls were diverted to his voicemail from 19:09 onwards on the 6th December 1995. There was no evidence that he attempted to retrieve the voicemail messages which were left. The available cell site data for Mr Tate's mobile suggested that the last incoming call which he answered began at 18:44 on 6th December 1995. The Crown relied on the timing of the various calls to suggest that the victims were murdered at some point between the end of the 18:44 call to Mr Tate and the beginning Mr Whomes' 18:59 call to Mr Nicholls.
21. The Court heard evidence that, at about 18:10 on 6th December 1995, Claire Carey arrived at Mr Tate's address to meet him. The lights were on and music was playing. Mr Tate had left a note saying that he had: "had to pop out for half an hour" and asked her to wait.

He did not return. The Court also heard evidence that the victims had a dinner reservation at the Global Net Cafe in Romford at 20:30 on the evening of the 6th December 1995 (it appears that they intended to attend: the reservation had been re-arranged that day). None of the victims attended the restaurant; nor was there any evidence that they had contacted anyone to explain their absence.
22. Mr Steele and Mr Whomes were arrested and interviewed under caution in relation to the murders. They made no substantive replies

when questioned.

Defence Case - Mr Steele

23. It was Mr Steele's case that he had been testing his boat rather than importing drugs when he was arrested on the evening of 7th/8th November 1995. He had been elsewhere at the time of the murders.
24. It was put to Mr Nicholls in cross-examination that it was Nicholls who had been importing drugs and that Mr Steele had only gone with him to Holland to assist him in recovering money. It was put to Mr Nicholls that he had, with the assistance of a corrupt police officer, "set up" Mr Steele and Mr Whomes in relation to the murders. Mr Nicholls denied these allegations.
25. Mr Steele gave evidence. He had previously been convicted of importing drugs by plane and served a nine-year sentence. He had bought and adapted the boat, but used it for diving. He had not asked Mr Nicholls to obtain a gun for him and knew nothing about the gun found in the loft of his house. The telephone conversations between Mr Nicholls, Mr Whomes and himself on 6th December had been in relation to collecting a trailer from one of Mr Whomes' relatives to pick up Mr Nicholls' car that had broken down. Mr Steele had collected the trailer and then gone home where he saw some people who were interested in buying his house. He had not revealed this to the police when interviewed because he was advised not to answer questions.

Defence Case - Mr Whomes

26. Mr Whomes gave evidence and denied any involvement in drugs importation or the murders. He had gone out in Mr Steele's boat on 7th November to help test it. He had gone to Ostend with Mr Steele to help bring some money back for Mr Nicholls. On 6th December, he had gone to collect a car for Mr Nicholls. Mr Steele had helped him by collecting a trailer to put the car on. He had not answered questions in interviews because he realised that Mr Nicholls was trying to implicate him in the murders and was concerned that if he said the wrong thing, he might implicate himself in something that he had not done.

Verdicts

27. Mr Whomes, Mr Steele and Mr Corry were convicted of conspiracy to import drugs. Mr Whomes and Mr Steele were convicted of the murders of Messrs Tate, Tucker and Rolfe. Mr Steele was acquitted of possession of the shotgun.

Previous appeal history

This section summarises the arguments raised on appeal in 1999 and the outcome of that appeal (summary taken from previous Commission Statement of Reasons on the referral of Mr Whomes' conviction to the Court of Appeal). This section also summarises the arguments raised on appeal in 2006 and the outcome of that appeal.

28. On 12th February 1998, Mr Whomes applied for leave to appeal against his convictions. His grounds, which were drafted by counsel, were as follows:

- Severance: The judge was in error and exercised his discretion wrongly in rejecting two defence applications to sever the drugs counts from the murder counts. The first application was made prior to trial, and the second, to sever the counts and to grant re-trials, was made at the close of the Crown's case;
- No Case to Answer: The judge was in error in refusing to remove counts 2, 3, and 4 from the jury in that, taking the evidence of the Crown at its highest, no reasonable jury properly directed could safely have convicted on it;
- Evidence of Jasper: The judge was in error in refusing to allow Mr Whomes, through counsel, to ask certain questions of a witness, Mr Jasper, called by Mr Steele;
- Mobile Telephone Evidence: The judge erred in his summary of the mobile telephone evidence and failed properly to assist the jury to assess the significance of this evidence;
- Irrational Verdicts: The verdicts of the jury were inconsistent in that the Crown's case on each count relied on the evidence of Darren Nicholls. The jury must, in deciding to acquit Mr Steele of the offence of possession of a firearm, have rejected Mr Nicholls' account. The other convictions that were based on his evidence were inherently unsafe.

29. Mr Whomes submitted additional grounds of appeal of his own composition.

30. On 6th July 1998, the Single Judge refused leave to appeal against the convictions.

31. On 25th January 1999 the Full Court of Appeal considered and refused a renewed application for leave to appeal. In refusing leave to appeal, the court made the following observations:

Severance: The learned trial judge exercised his discretion correctly regarding severance of the counts on the indictment. It would have been artificial to invite the jury to hear the murder counts on their

own since it would have appeared to be an entirely motiveless crime which they would have found difficult to understand;

No Case to Answer: The Court agreed entirely with the trial judge's decision that there was a case for the defendants to answer;

Evidence of Jasper: The judge was correct to exclude the evidence that Mr Whomes sought from the witness Jasper, as it was clearly hearsay;

Mobile Telephone Evidence: There was no reason to criticise the way in which the trial judge dealt in his summing up with the evidence of mobile telephone calls. The judge delivered an extremely long, but also extremely fair, comprehensive and neutral account of the evidence. In view of the length of the trial and the degree of care which was devoted to the issues, the Court thought it unlikely that the jury were not fully alive to what the issues were;

Irrational Verdicts: It was not irrational for the jury to acquit on count 5 and to convict on the first four counts. The evidence on count 5 was quite different.

32. Mr Whomes applied to the Commission on 15th May 2002. Following a lengthy review, which included a 'Section 19 investigation', the Commission referred the case to the Court of Appeal on 15th December 2004. The case was referred because there was new evidence that, before the trial, Mr Nicholls entered into arrangements with sections of the media whereby he was to be paid or expected to be paid for his story, and those matters were not disclosed by the Crown. In view of the use that the defence could have made of the new evidence in attacking Mr Nicholls' credibility and the centrality of his evidence to the Crown's case, the Commission considered that there was a real possibility that the Court of Appeal would quash the convictions. The Commission also considered that there was a real possibility that the Court of Appeal would receive new evidence from a mobile phone expert, David Bristowe.
33. On 22nd February 2006 the Court of Appeal considered the safety of Mr Whomes' convictions, alongside those of Mr Steele and Mr Corry. The following grounds were argued before the Court on that occasion:
 - Fresh evidence regarding Darren Nicholls' contact with the media undermined the credibility of his evidence and the police investigation;
 - Fresh expert evidence from David Bristowe regarding the cellsite analysis of mobile phone calls made around the time of the murders cast doubt on the safety of the convictions;
 - The trial judge misdirected the jury on their right to draw

adverse inferences from Mr Steele's failure to answer questions when interviewed by the police.

34. The Court of Appeal upheld the convictions and dismissed the grounds of appeal for the following reasons:

Regarding Darren Nicholls' contact with the media

35. The Court stated at paragraph 35:

“First, all the essentials of Nicholls' account had been imparted to police officers in interview and reduced to witness statements before he had any dealings with Thompson or any other members of the media. Although the defence case at trial was that what occurred in the interviews was the tip of an iceberg of collaboration between Nicholls and Detective Constables Brown and Winstone, there is not a shred of evidence to support such a contention. That issue was resolved by the jury and there is no new evidence to the contrary. Secondly, Nicholls' account was long and detailed and in all important respects it remained consistent throughout. He was in the witness box for almost three weeks and was rigorously cross-examined by counsel for all three appellants. Thirdly, this was not a case in which the defence had no material with which to cross-examine. The material at the disposal of the defence enabled them to present Nicholls to the jury as a time-served criminal of some sophistication, a dishonest drug-trafficker and a man with a corrupt relationship with a police officer. He was plainly a manipulative man with his own interests to serve. He told the jury of the long time he had spent in the company of police officers leading up to the trial in the course of which they had been anxious that he might fail to come up to proof. Notwithstanding the volume of material which the defence were able to throw at Nicholls, the jury remained sure, and unanimously so, about the essentials of his account of the drugs importations and the murders. In those circumstances, if the jury had known about the media contacts and Nicholls had admitted them as he would have been bound to do, although those contacts are to be deprecated, it is difficult to see how they could have added significantly to the cross-examination armoury in the circumstances of this case. Fourthly, although the jury were convinced by Nicholls' account of the essentials of the drugs importations and the murders, it is implicit in their verdict of Not Guilty on Count 5, the firearms charge, that they did not accept his evidence about everything. Baroness Kennedy seeks to turn that to the advantage of the appellants by submitting that, in effect, having started down the road to disbelief, the jury might have travelled further with one more push. However, the combination of factors is equally susceptible to the analysis that the jury were prepared to accept Nicholls on the drug importations and murders, notwithstanding his many personal shortcomings and in spite of the fact that they were unpersuaded by his account of one of the offences alleged on the indictment. For our part, we consider it virtually certain that the jury would also have rejected that part of Nicholls' evidence where he

sought to minimise the involvement in and knowledge of the drugs importations by his friend Reid. We cannot escape the conclusion that the jury, mindful of Nicholls' personal shortcomings and accepting that he had probably not told the truth about, for example, the firearm and Reid, were nevertheless utterly convinced by his account of the essentials of the drugs importations and the murders. Fifthly, it is important not to forget the other evidence in the case. Nicholls' account of the drugs importations was supported by a quantity of documentary evidence which confirmed aspects of his account although, to the extent that it did so, the appellants also proffered explanations which were consistent with that material. Nevertheless, the evidence of the arrests of the appellants in proximity to the boat on 8 November and the finding of a small trace of cannabis in the boat gave some support to Nicholls' account. So far as the murders were concerned, the telephone evidence to which we shall return, was, in our judgment, strongly supportive of Nicholls' account. Moreover, although Steele called alibi witnesses, the prosecution succeeded in proving that the alibi was false. Sixthly, even if, contrary to the view we have expressed, a reasonable jury might conclude that Detective Constables Brown and Winstone had been less than candid in their evidence to this court about their knowledge of Nicholls' contacts with Thompson and the media, that does not undermine Nicholls' trial evidence to a material degree."

Regarding the cell-site analysis of mobile phones

36. The Court heard Mr Bristowe's evidence before deciding whether to receive it under section 23 of the Criminal Appeal Act 1968. Having heard the evidence the Court declined formally to admit it, being satisfied that it was not new evidence. In reaching this conclusion the Court referred to the following points which rendered the new tests less reliable than the tests conducted for the trial:
- When he conducted his original tests pre-trial Mr Bristowe had not used Mr Whomes' phone, but one of the same make and model. When conducting the new tests Mr Bristowe used Mr Whomes' actual phone, but Mr Whomes' phone may have degraded in the intervening five years since the original tests were performed;
 - The conditions of the cell site had changed in the intervening five years;
 - Mr Whomes' phone was an analogue model and analogue usage had declined markedly in the intervening five years which would alter the conditions.
37. Additionally the Court noted that Mr Bristowe stated when giving evidence for the appeal that he remained of the same opinion that he had given at trial.

Adverse inference from silence

38. The Court accepted that the direction given at trial was different from the direction recommended in the current Judicial Studies Board directions, but noted that a change in the law would not automatically render a conviction unsafe. The Court stated that it was:

“Very likely, the judge's directions would be different if the matter were to be tried now. However, in the circumstances of this case, we do not think that any injustice whatsoever resulted from the directions which were given. No doubt as to safety of the conviction is raised in our minds by this point and accordingly, this ground of appeal is also rejected.”

The Applicant's Submissions

39. On 6th August 2006 Mr Whomes applied to the Commission for a second review of his conviction. Throughout the course of the Commission's review more than sixty letters have been received from Mr Whomes containing additional submissions in support of his application. Mr Whomes has also provided the Commission with various supporting documents, including two expert reports by David Bristowe (dated June 2007 and 14th July 2009). The Commission has also met with Mr Whomes on two occasions to discuss his application, on 19th September 2008 and 1st June 2010. In addition, the Commission met with Mr Whomes' representative, Christopher Bowen, at the Commission's offices on 25th June 2009.
40. On 26th September 2007 the Commission received an application from Mr Whomes' co-accused, Michael Steele, for his convictions to be reviewed for a second time. A large number of additional submissions have been received from Mr Steele. In reviewing Mr Steele's submissions the Commission has considered whether any of them could assist Mr Whomes' application.
41. The Commission has considered all of the submissions which have been received from Mr Whomes, Mr Bowen and Mr Steele, which run to over six hundred pages. The Commission has also considered all of the supporting documents which have been provided. In summary, the Commission has addressed the following points in the course of its review:
 - 1) A new witness, Michael Wright, has made a statement that he saw a metallic blue Range Rover in the vicinity of the Rettendon Turnpike at 23:00-23:45 hours on 6th December 1995.
 - 2) A forensic meteorologist, Adrian Runacres, has provided an expert report in the case. The Commission has considered whether the report provides any support for the proposition that the victims' Range Rover arrived in the lane later than claimed by Darren Nicholls.
 - 3) The applicants submit that the prosecution manipulated evidence in relation to time of death.
 - 4) The applicants submit that the scene of the crime (which was discovered on 7th December 1995) was "staged"; and that it contained fabricated evidence. They highlight the position of spent cartridge shells, the fact that the 8th shell was never found, and the "passive" nature of the scene.
 - 5) It is submitted that there is new evidence in relation to mobile telephone usage which renders the convictions unsafe. New expert reports by David Bristowe (x3) and Ross Patel are relied upon. A large number of submissions are made in relation to telephone data.

- 6) The applicants submit that the Crown failed to disclose important evidence at trial which could have been utilised for the defence, including statement S177, which is alleged to be an undisclosed witness statement by Darren Nicholls.
- 7) It is submitted that Essex Police colluded with and coached Darren Nicholls in his account of events.
- 8) It is submitted that, contrary to the conclusions of the Court of Appeal in 2006, Darren Nicholls has embroidered his account at various stages throughout the history of this case.
- 9) It is submitted that Essex Police were complicit in Nicholls' meetings with the media.
- 10) Reports have emerged in the national press, since trial in 1997, that Darren Nicholls has been involved in further criminality.
- 11) Numerous allegations of impropriety are made against officers of Essex Police.
- 12) It is submitted that the Commission's section 19 investigation was defective.
- 13) Numerous criticisms are made of the way the Court of Appeal handled the case when it considered it in February 2006.
- 14) There are submissions which rely upon legal authorities.
- 15) It is submitted that Donna Jagers' witness statement (14/03/1996) contradicts her account as reported by DI Florence in his report R4 (08/12/95) and the police message M93 (also dated 08/12/1995).
- 16) In relation to the timing of events on 6th December 1995, Mr Steele submits that, since it was "rush hour on a snow driven night", Mr Tate could not have travelled from the Halfway House pub at 18:30 (where Mr Nicholls claims to have seen him) to Workhouse Lane at 18:44 (where he is alleged to have been when he received a call from Sarah Saunders).
- 17) Raymond Wright, a witness who gave evidence at trial, described a Range Rover turning into Workhouse Lane at approximately 19:00 on 6th December 1995. The description of this vehicle did not match that of the Range Rover that the three deceased were discovered in on 7th December 1995.
- 18) Submissions are made in relation to the cannabis which was alleged to have been found in the Rigid Inflatable Boat (RIB).
- 19) Further disclosure is requested in relation to possible alternative suspects for the murders.

The Commission's Review

42. The Commission has considered the following materials in its review of this case:

- Essex Police files and the HOLMES database;
 - Crown Prosecution Service files;
 - Crown Court files;
 - Court of Appeal files, including trial transcripts;
 - Section 19 investigation files from the first Commission review;
 - Submissions and associated materials received from the applicants.
43. In the course of its review the Commission has also:
- Interviewed and taken witness statements from Sharon Teresa Wright (on 29th January 2008) and Graham Kim Townes (on 26th March 2008);
 - Obtained an expert report from forensic meteorologist, Adrian Runacres (20th April 2010);
 - Instructed an expert in mobile telephone forensics, Dr James Luck, to interrogate the mobile phone handsets which were discovered with the bodies of the victims (results received 19th April 2010);
 - Made various enquiries of Essex Police, including contact with former Detective Inspector Brian White, a meeting with former Detective Inspector George Florence (22nd December 2009), and telephone contact with former Detective Superintendent David Bright (21st January 2008). The Commission is aware of the allegations that the applicants have made against these former police officers. The Commission has remained alert to those allegations in all of its dealings with the former officers. The Commission also notes, however, that there has never been any evidential support for the applicants' allegations against the individuals in question.

Analysis and Reasons

44. An application to the Commission is not an opportunity to re-run either the trial or the appeal. Matters of pure speculation or unsubstantiated allegation constitute neither new evidence nor new argument capable of giving rise to a real possibility that the Court of Appeal will quash a conviction. Neither can such a real possibility arise from the accumulation of multiple unsubstantiated allegations. Furthermore, and for the avoidance of doubt, neither speculation nor unsubstantiated allegation constitutes an exceptional circumstance justifying the referral of a case to the Court of Appeal in the absence of new evidence or argument. It is in this light that the Commission has considered the numerous submissions by the applicants and their representative in this case.

45. Issue one: New witness Michael Wright

A new witness, Michael Wright, has made a statement that he saw a metallic blue Range Rover in the vicinity of the Rettendon Turnpike at 23:00-23:45 hours on 6th December 1995. There were two men in the front seats of the vehicle, and one large man seated in the rear. Given that the victims were driving a blue Range Rover on the evening of their disappearance (and their bodies were discovered in the same vehicle), the applicants submit that Mr Wright's statement constitutes significant new evidence which assists in determining the time of their deaths. It is submitted that Mr Wright's account undermines the evidence of Darren Nicholls that the murders took place at around 19:00 on 6th December 1995, and provides support for the trial evidence of William Jasper and Steven Rogers, which indicated that the murders may have taken place at around midnight that night.

46. The Commission was provided with Mr Wright's witness statement on 31st October 2007. Having considered that statement, and the preceding interviews (conducted by the Geoff Kelly and Christopher Bowen on 18th May 2007) the Commission took witness statements from Mr Wright's wife, Sharon Teresa Wright (on 29th January 2008), and from Mr Wright's friend, Graham Kim Townes (on 26th March 2008). Those statements are disclosed at Annex B of this Provisional Statement of Reasons.
47. Sharon Wright describes an occasion in late 1995 when she and her husband were watching the lunchtime news on the television, when a news report stated that the bodies of three men had been discovered in a Range Rover somewhere in Essex. Mrs Wright remembers her husband pointing to the television and saying: "that's the same Range Rover, that is it, that's the one that cut us up". Graham Townes describes an incident, which he believes to have taken place sometime between 11pm and midnight on the night before he became aware of the Rettendon murders in 1995, when he was the passenger in Mr Wright's vehicle as it was "cut up" by a larger, 4x4- style, vehicle. There were three men in the 4x4, one of whom was a very large man sitting in the rear of the vehicle. Mr Townes does not know where this incident took place.
48. The Commission has considered Mr Wright's account in the context of those given by various other witnesses in the case. In addition to the statements of Mrs Wright and Mr Townes, the Commission has considered the witness statements (and, where applicable, the trial evidence) of: Michael Stenning, Andrew Reynolds, Raymond Wright, Ian Williams, Kevin Tarbuck, Stuart Armstrong, William Jasper, Steven Rogers, Steven Hills, Peter Theobald, Kenneth Jiggins and PC Knights. Although none of these accounts constitutes new evidence for the Commission's purposes (see page 2, paragraph i above),

they have all been reconsidered in the light of the new statements by Mr and Mrs Wright and Mr Townes. The Commission has paid particular attention to the accounts of William Jasper and Steven Rogers. Mr Jasper gave evidence at trial that *he* drove the murderer (who was not Mr Steele, Mr Whomes or Mr Nicholls) to Rectory Lane, which is near to the scene of the murders, at around midnight on the night of the 6th-7th December 1995. Mr Rogers gave evidence at trial that he heard a rapid series of gunshots (more than two shots) at around midnight on the night of 6th-7th December 1995.

49. The Commission has considered whether or not the information provided by Mr Wright, Mrs Wright and Mr Townes gives rise to a real possibility that the Court of Appeal would overturn the convictions in this case. In considering whether or not such a real possibility exists, the Commission has referred to section 23 of the Criminal Appeal Act 1968 (as amended by section 4 of the Criminal Appeal Act 1995) in order to assess the likelihood of the Court of Appeal receiving the new evidence. Section 23(1) of the act states:

“For the purposes of an appeal under this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice-

fa) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case;

(b) order any witness who would have been a compellable witness in the proceedings from which the appeal lies to attend for examination and be examined before the Court, whether or not he was called in those proceedings; and

(c) receive any evidence which was not adduced in the proceedings from which the appeal lies.”

50. In determining whether it is necessary or expedient in the interests of justice to receive any evidence, section 23(2) of the act states that the Court of Appeal shall have particular regard to:

(a) whether the evidence appears to the Court to be capable of belief;

(b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;

(c) whether the evidence would have been admissible in the proceedings from which the appeal lies in an issue which is the subject of the appeal;

(d) whether there is a reasonable explanation for the

failure to adduce the evidence in those proceedings.

Whether the evidence appears to be capable of belief

51. The Commission considers that, in general terms, the accounts given by Mr and Mrs Wright and Mr Townes - i.e. that Mr Wright was involved in an incident with a Range Rover in the Rettendon area in December 1995 - are plausible. However, in assessing the view that the Court of Appeal would be likely to take of the credibility of their proposed new evidence, the Commission has considered the following points:

- Despite public appeals for information soon after the murders (which all three witnesses concede that they were aware of) none of the witnesses volunteered their information to the authorities at the time. It was only eleven years later, following a fortuitous conversation between Mrs Wright and Mr Bowen, that these witnesses agreed to provide their information. When asked why they had never come forward previously, all three individuals stated that they did not consider it to be relevant to the Rettendon murder enquiry. If this case were referred, the Court of Appeal would need to decide whether it considered this to be a plausible explanation for the eleven year delay in coming forward. The Court's decision on this issue would be likely to influence its overall view of the credibility of what the proposed new witnesses have to say;
- In Mr Wright's witness statement, dated 12th August 2007, there is no mention of the registration number of the Range Rover which he saw in December 1995; however, in interview on 18th May 2007 Mr Wright stated that he could remember that there were "two 4's" in the registration number. He confirmed that he did not write down any details from the registration number at the time of the incident. He also confirmed that he had seen the

registration number plate in television footage subsequent to the murders. If this case were referred, the Court of Appeal would have to consider the credibility of Mr Wright's claim to have remembered "two 4's" in the registration number, in the context of the fact that he did not make any note of the number, and then subsequently saw the full registration number pictured in television footage;

- In interview on 18th May 2007 Mr Wright described the rear seat passenger wearing a white t-shirt. The Commission observes that Mr Tate was not wearing a white t-shirt on the night in question (and nor were the other two victims), however, a photograph of Mr Tate was shown during subsequent television news coverage of the murders which depicted Mr Tate wearing a white t-shirt. The Commission considers that Mr Wright's assertion implies that at least some of his account may have originated from the television news coverage of the murders;
- The Commission also notes that a comparison of Mr Wright's statement with that of his wife reveals an inconsistency in their accounts. Page five of Mrs Wright's statement includes the following comment:

"I also remember that when Mike first mentioned this to me, when we saw it on the TV, that he remembered the end of that lane being taped off by the police and he had seen this when he drove home the same way. That helped him to put two and two together. The latest he would have arrived home would have been about between 7am and 8am."

The Commission observes that the victims' bodies were discovered just before 8am on 7th December 1995, so it seems unlikely that he could have seen "the lane being taped off by police" when on his way home from work. At page three of his statement Mr Wright states:

"My work finished at about 06:00 on Thursday 7th December 1995. Nothing of note occurred during my return journey, which was the outbound journey in reverse. I got home about 07:30-08:00 and went to bed."

The Commission considers that this inconsistency is another which would be likely to affect the Court of Appeal's view of the credibility of the accounts given by Mr and Mrs Wright

52. Having considered these points, the Commission observes that there are a number of reasons why the Court of Appeal might decide that the proposed new evidence is not capable of belief. However, it has not been necessary for the Commission to reach a concluded view on this matter, in the light of paragraphs 53 and 54 below.
- Whether the evidence may afford any ground for allowing the

appeal

53. The Commission observes that Mr Wright's account, taken at its highest, is that he saw a blue Range Rover, containing three male passengers, in the vicinity of the Rettendon Turnpike at 23:00-23:45 hours on 6th December 1995. Even if this evidence were accepted by the Court of Appeal, the Court would still need to assess whether it might afford a ground for allowing an appeal. Having considered the accounts of Mr Wright, Mrs Wright and Mr Townes, the Commission does not consider that there is a real possibility that the Court of Appeal would conclude that they provide strong enough evidence to afford a ground for allowing an appeal. The Commission notes, in particular, that:

- Mr Wright describes a Range Rover approaching the Rettendon Turnpike from the north and turning left (i.e. east¹) towards South Woodham Ferrers. It appears, therefore, that the vehicle had already passed the entrance to Workhouse Lane when it was seen by Mr Wright. It follows that, if it were the victims' vehicle, the Range Rover would either have had to turn around and go back to Workhouse Lane via the 'old' A130, or travel to Workhouse Lane via Rectory Lane and across the fields of Whitehouse Farm. The Commission considers the latter scenario to be highly unlikely, as it would have involved crossing the fields, lifting the locked gate out of its footing, turning the Range Rover around in the lane (for no obvious reason), and then replacing the locked gate into its footing;
- Mr Wright says he saw a Range Rover at 23:00-23:45 on the night in question, and it must follow from that that the occupants of that vehicle were at liberty at that stage. If this were the victims' Range Rover, it leaves more than four hours unaccounted for in terms of their movements on the evening in question. No explanation has been found for why the victims did not attend their dinner at the Global Net Cafe, or for the fact that they did not make telephone calls, even to explain where they were;
- Doubts remain over those aspects of Mr Wright's account which appear to link the incident which he describes to the victims' Range Rover, i.e. his partial memory of the registration number and his memory that the rear passenger wore a white t-shirt (see paragraph 51 above);
- The witness statement of Graham Townes does not add anything of substance to the statements of Mr and Mrs Wright.

54. For the reasons given above, the Commission takes the view that

¹ This has been corrected, on release of the Commission's Final Statement of Reasons, from the original 'west'

there is no real possibility that the Court of Appeal would find the proposed new evidence to afford a ground for allowing an appeal in this case. There is no real possibility, in the Commission's view, that the Court would conclude that the proposed evidence might reasonably have affected the decision of the jury to convict, if it had been heard at trial.

Conclusion in relation to the witness statements of Mr Wright Mrs Wright and Mr Townes

55. For the reasons given at paragraphs 51-53 above, the Commission does not consider that there is a real possibility that the Court of Appeal will think it is necessary or expedient in the interests of justice to receive the proposed evidence of Mr Wright, Mrs Wright and Mr Townes. Consequently, the applicants' submission in relation to Mr Wright does not give rise to a real possibility that the Court of Appeal would overturn the convictions in this case.

56. Issue two: Expert report by Adrian Runacres

As explained at paragraph 48 above, the Commission has considered Mr Wright's new statement in the context of a number of trial witnesses, including Mr Peter Theobald, who discovered the Range Rover just before 8am on 7th December 1995. In view of the fact that there was no snow or frost on the vehicle, Mr Theobald testified that he had formed (and remained of) the opinion that the Range Rover had not been in the lane overnight. This aspect of Mr Theobald's trial evidence thus contradicted Darren Nicholls' account that the Range Rover had been in the lane since around 7pm on 6th December 1995.

57. Having considered Mr Theobald's evidence, the Commission decided to seek expert advice on the question of whether or not the absence of snow and frost from the surfaces of the vehicle could give any useful indication as to how long it had been situated in Workhouse Lane before being discovered. The Commission wished to discover whether expert evidence might offer support for the proposition that the victims' Range Rover arrived in the lane far later than claimed by Darren Nicholls (and as suggested by the statement of Michael Wright and the trial evidence of William Jasper, Steven Rogers and Peter Theobald).
58. On 29th September 2009, the Commission instructed forensic meteorologist Adrian Runacres to provide his expert opinion. The Commission asked Mr Runacres to complete a comprehensive search of all available sources which could establish the prevailing weather conditions for Workhouse Lane near Rettendon in Essex on 6th and 7th of December 1995. The Commission also asked Mr Runacres to provide (in so far as the results of his data search enabled him to do so) his expert opinion on how long he believed the Range Rover had been in Workhouse Lane by the time it was

discovered, just before 8am on 7th December 1995. Finally, the Commission asked Mr Runacres for his expert opinion (to the extent that it differed from his answer to the Commission's previous question), as to how he would expect a vehicle to appear which had been stationary in Workhouse Lane between 7pm on 6th December 1995 and 8am on 7th December 1995.

59. Mr Runacres' expert report was received by the Commission on 20th April 2010. In relation to the absence of snow on the Range Rover, Mr Runacres concluded:

"It appears likely (although I cannot be certain) that no snowfall occurred after approximately 17:00hrs on Wednesday 6 December 1995. It is clear from the witness evidence that the Range Rover must have arrived at Workhouse Lane after that time. Therefore, the lack of lying snow on the vehicle at the time it was discovered does not assist in determining the arrival time of the Range Rover" [paragraph 7.4 of report].

60. In relation to the absence of frost on the Range Rover, Mr Runacres concluded:

"...despite the shelter effects of the hedgerows and trees, as a result of the sub-zero air temperatures and relatively high humidities overnight and during the early morning hours, I would expect any vehicle that had been stationary in Workhouse Lane for a prolonged period of time prior to 08:00hrs on Thursday 7 December 1995 to have exhibited a hoar frost on its external surfaces" [paragraph 6.10 of report]...

"I cannot determine the precise length of time that would have been required for a hoar frost to form on the external surfaces of the Range Rover after it had arrived in Workhouse Lane and its ignition switched off. However, in my opinion, I consider it likely that this would not have required more than a few hours or so. Assuming the Range Rover was left undisturbed, I am currently unable to explain this apparent anomaly when compared to the Prosecution case that the Range Rover arrived at the incident scene at approximately 19:00hrs on Wednesday 6 December 1995" [paragraphs 7.6 and 7.7 of report].

61. Mr Runacres' report was disclosed to the applicants on 6th May 2010. Having considered the report, Mr Steele has stated that he believes Mr Runacres' findings to be "seriously flawed". He does not wish the Commission to rely on any of Mr Runacres' conclusions. Mr Steele questions whether Mr Runacres is suitably qualified to offer an expert opinion, since he possesses no qualification in the science of meteorology. Mr Steele also points out that, in any event, meteorology is an inexact science.

62. Mr Steele disagrees with Mr Runacres on the following points:

- Mr Steele disagrees with the conclusion that it is: “likely that no snowfall occurred after approximately 17:00 hours on Wednesday 6th December 1995”. He points out that two witnesses described it snowing in the vicinity of the scene of the crime *after* 17:00 hours on the day in question: Kevin Tarbuck stated it was snowing at 19:50 (statement S51, dated 14th December 1995) and Ian Williams stated that it started snowing lightly just before 20:30 (S73, dated 19th December 1995);
 - Mr Steele states that a heavy vehicle like the Range Rover would have left tyre tracks, and the absence of these can only be explained by their being covered with snow after the vehicle arrived;
 - The absence of snow on the vehicle can also be explained by the warmth of its surfaces when it arrived at the scene and/or a coating of ‘glycol’ antifreeze, which Mr Steele suggests had recently been applied to the vehicle [the Commission notes that, if Mr Steele is correct in this observation, then this further undermines the defence proposition that the absence of frost on the Range Rover indicated that it had not been in Workhouse Lane overnight];
 - Mr Steele disagrees with the conclusion that it: “would not have required more than a few hours or so”... “for a hoar frost to form on the external surfaces of the Range Rover after it had arrived in Workhouse Lane and its ignition switched off’. Mr Steele states that the absence of frost can be accounted for by the shelter which was provided by the surrounding foliage and/or a coating of ‘glycol’ antifreeze.
63. Mr Whomes has also considered Mr Runacres’ report and has provided his own observations. Like Mr Steele, Mr Whomes disagrees with Mr Runacres on the subject of snow, pointing out that there must have been snowfall after the arrival of the Range Rover, because Mr Jiggins stated at trial that on the morning of the 7th December: “there was a lot of snow and ice over the puddles” in Workhouse Lane and “none of the ice had been broken”. The Commission notes, conversely, that the fact of the ice not having been broken suggests that the Range Rover may well have been in the lane for some time;
64. On the subject of frost Mr Whomes submits that Mr Runacres’ report provides support for his case, in that it confirms the lay opinion of Mr Theobald that he would have expected there to be frost on the Range Rover if it had been in Workhouse Lane overnight.
65. The Commission has considered Mr Runacres’ expert report, together with the observations of Mr Steele and Mr Whomes. The Commission takes the view that the report adds nothing of any

substance to the position as it was at trial in relation to the absence of frost and snow on the Range Rover. Nor does the Commission consider that Mr Runacres' report assists as regards the proposition that the shootings may have occurred at around midnight on the night in question. It does not provide any support, therefore, for the statements of Mr Wright, Mrs Wright and Mr Townes.

66. The Commission has reached the view that Mr Runacres' expert opinion is not capable of giving rise to a real possibility that the Court of Appeal would overturn the convictions in this case. In the light of this view, the Commission has decided not to revert to Mr Runacres for his comment on the points raised by Mr Steele and Mr Whomes.

67. Issue three: The allegation that the prosecution manipulated evidence in relation to time of death

The applicants have highlighted that Home Office pathologist Dr Lannas did not provide an estimate of time of death when she gave evidence at trial. In her evidence she stated that the police did not ask her to estimate a time of death, but the applicants point out that police action A3680 suggests that she was asked give an estimate, by the deputy SIO, Detective Inspector George Florence. The applicants add that, since the time of their trial, Dr Lannas has faced disciplinary action in connection with other cases. It is submitted that Dr Lannas was incompetent.

68. The Commission notes that a similar submission was made in the course of Mr Steele's first application to the Commission (application received on 2nd February 1999). At paragraphs 107 and 108 of the Commission's Statement of Reasons for that review (dated 15th December 2004), the Commission reached the following conclusion on the issue:

"It is Mr Steele's contention that Dr Lannas did determine a time of death but that, as this was a time for which Mr Steele had an indisputable alibi, Dr Lannas had withheld this time of death from the Court. He has pointed to cases that post-date his trial at which the quality of Dr Lannas's evidence and her competence have been called in to question.

"The Commission notes that Dr Lannas's evidence was that it was not possible to determine the time of death through pathology with any degree of accuracy. There is no evidence to support Mr Steele's contention that she deliberately withheld a time of death because it did not fit the prosecution theory regarding the murders."

69. In the course of the current Commission review the applicants have submitted no additional evidence or argument on the subject of Dr Lannas. There remains no evidence that Dr Lannas ever carried out any assessment of the likely time of the deaths in this case. Nor is there any evidence that a time of death estimate was deliberately

withheld as part of prosecution manipulation of evidence in relation to time of death.

70. The absence of a time of death estimate has been well known since before the applicants' trial and thus does not constitute new evidence or argument for the Commission's purposes (see page 2, paragraph i above). In any event, the absence of a time of death estimate does not, in the Commission's view, give rise to a real possibility that the Court of Appeal would overturn the applicants' convictions.
71. Mr Whomes' and Mr Steele's representative, Mr Bowen, has pointed out that the parameters for time of death varied in the public announcements which Essex Police made in December 1995: a police road sign appeal (dated around 14th December 1995) stated "murder here PM Wednesday", while LWT's "Crime Monthly" programme on 22^{nct} December 1995 stated that the victims were killed between 19:00 and 21:00". During his police interview on 17th May 1996, Mr Steele was informed that the time of death was around 19:00. The Commission has considered this submission, and observes that it is entirely understandable that the police's view of the timing of the murders would have been refined over time as the incident room continued to collate information from numerous different sources. Nothing in Mr Bowen's submissions on this issue constitutes evidence that the police "manipulated" any evidence in relation to time of death.
72. Mr Bowen has also pointed out that Detective Superintendent David Bright, in his statement for the Commission's 'Section 19 investigation' dated 20th May 2004, described being informed of the discovery of the victims' bodies at 6:30 am on 7th December 1995, some 90 minutes before the bodies were discovered by Messrs Jiggins and Theobald. Mr Bowen submits that this indicates that the police were aware of the deaths before the discovery of the bodies by Mr Jiggins and Mr Theobald, and this shows that, contrary to what the defence have been informed, the victims were under surveillance on the day of the murders.
73. The Commission has contacted former Detective Superintendent Bright and asked him to comment on the reference to 6:30 am which appears in his 2004 statement. He responded to the Commission on 21st January 2008, explaining that his comment that the call was at 6:30 am was an approximation. He could not recall who telephoned him, nor could he offer any further explanation for the time discrepancy.
74. In the course of its review of this case, the Commission has discovered no evidence that any police officer was aware of the murders before the discovery of the bodies by Mr Jiggins and Mr Theobald. Nor has the Commission discovered any evidence that the

victims were under surveillance on 6th December 1995. In the course of the Commission's review, Essex Police have confirmed that surveillance of the victims did not take place on the 6th December 1995. The Commission also notes Mr Bowen's observation (during the Commission's meeting with him on 25th June 2009) that the surveillance logs for the operation in question make no reference to any surveillance on 6th December 1995.

75. The Commission has found no evidence that the police or the prosecution "manipulated" any evidence in relation to time of death. Consequently, this submission by the applicants does not give rise to a real possibility that their convictions would be overturned by the Court of Appeal.

76. Issue four: The allegation that the scene of the crime was "staged"

The applicants submit that the scene of the crime contained fabricated evidence. They highlight the position of spent cartridge shells, the fact that the 8th shell was never found, and the "passive" nature of the scene. In support of his arguments on this issue, Mr Steele relies upon his own previous submissions to the Commission (in connection with the first Commission review) and the expert reports of forensic pathologist Dr Cary (2nd August 1997) and forensic scientist Dr Renshaw (23rd August 1997).

77. Mr Steele submits that it is "not physically possible for the shell case 'E' to land in the glove box through the ejection mechanism of any firearm and can only be the result of being physically placed in position post the murders". The Commission notes that firearms expert, Dr Renshaw, appears not to agree with this submission (see page 11 of his report). In any event, the Commission observes that this issue was explored with forensic scientist Mr Burns at trial (see page 36 of the transcript of the trial judge's summing-up for 6th January 1998), and is therefore not new for the Commission's purposes.
78. Mr Steele also highlights "the anomaly of the spent shell case 'D' allegedly found in the rear offside foot-well of the vehicle that is absent from all photographs taken of the foot-well". The Commission observes that this is another point which was explored at trial, and so is not new for the Commission's purposes. It was raised with police photographer DC King (see page 28 of transcript of Summing-Up for 6th January 1998), and also with DI Hughes and DC Bettis (see pages 40 and 43-45).
79. In reviewing the applicants' submissions regarding the crime scene, the Commission has considered the expert report by forensic pathologist Dr Cary (2nd August 1997). Dr Cary's report highlights that the crime scene only contained evidence of seven shots, all from the same weapon, which is potentially at odds with Mr Nicholls' account that Mr Steele described six shots having been fired from

one gun and at least two more shots having been fired from another gun. The Commission notes that this argument is supported by firearms expert Dr Renshaw, at page 14 of his report. However, this is another point which was explored at trial, and so is not new for the Commission's purposes. The Crown's forensic scientist, Mr Burns, was of the opinion that all seven cartridge shells came from the same weapon (see page 31 of transcript of Summing-Up for 6th January 1998). In addition, Darren Nicholls was cross-examined about his recollection of what he was told about the number of shots which were fired (see page 63 of transcript of Summing-Up for 7th January 1998). In any event, the Commission notes that Mr Nicholls was giving an account of what he claimed to have been told by Mr Steele. Any alleged discrepancies between the scene of the crime and Mr Nicholls account must be assessed in that context.

80. Mr Steele's submissions in relation to the scene of the crime include the suggestion that the shotgun cartridge shells may have been planted at the scene of the crime in order to conceal the fact that a different murder weapon was used (perhaps the firearm which Darren Nicholls admitted to purchasing, but which Mr Steele was acquitted of possessing). The Commission notes that the report of firearms expert Dr Renshaw does not support this submission. At page 3 of the report Dr Renshaw states that "all of the wadding and shot recovered from the bodies of the deceased and the interior of the Range Rover are the same size and type as the wadding and shot which would have been loaded in the seven cartridge cases". The Commission has not discovered any evidence which suggests that the shotgun cartridge shells were planted at the scene of the crime. Consequently, this submission does not give rise to a real possibility that the convictions would be overturned by the Court of Appeal.
81. Dr Cary's expert report states his opinion that the murder scene was "rather passive", with the victims all seated normally in their seats and a "relative lack of actively shed blood". Dr Cary submits that this may indicate that the men were already dead or disabled when the shots were fired. The Commission observes that the passive appearance of the scene was an issue which was put to police officers at trial (see, for example, page 29 of transcript of summing-up for 6th January 1998) and so it does not constitute new evidence or argument for the Commission's purposes. In any event, in the course of the Commission's review, no evidence has been discovered which could support Dr Cary's theory that the scene of the crime may have been "staged". In the absence of such evidence, this submission cannot give rise to a real possibility that the convictions would be overturned by the Court of Appeal.
82. In his submissions regarding the scene of the crime, Mr Steele also observes (after studying the crime scene photographs) that the gate

which was in front of the vehicle appears to be capable of being opened without unlocking the chain, as one of the gate posts "appears to be capable of removal from its footing". Mr Steele also points out that there appear to be tyre tracks on the opposite side of the gate (the Commission has been provided with images which depict these tracks). It is suggested that the Range Rover may have arrived in Workhouse Lane from this direction. The Commission has considered this theory, but considers it to be pure speculation. There is no new evidence to suggest that the Range Rover actually did arrive in Workhouse Lane from the other direction (for the Commission's view of the likelihood of the theory being correct, see the first bullet point of paragraph 53 above). In the absence of such new evidence, this submission cannot give rise to a real possibility that the convictions would be overturned by the Court of Appeal.

83. Mr Steele submits that it is a "cause for much speculation" that no house keys were discovered on Mr Tate's person at post-mortem. The Commission notes the officer's report of DC Winstone (R8A, dated 11th December 1995) which states that he was at Mr Tate's address with Sarah Saunders on 9th December 1995 when Liz Fletcher arrived and returned "front door keys to the premises, keys to the Mercedes car index E532NMU and Miss Saunders' mobile phone". The Commission also notes that Sarah Saunders described this event in her police interview (see pages 13-15 of the record of tape recorded interview for 13th June 1996 at 13:43-14:17). The Commission acknowledges that this still does not explain why Mr Tate had no house keys on his person, since he was not scheduled to meet Ms Fletcher on the evening in question, but had arranged to meet Claire Carey at his house (she apparently had no door key either; according to her witness statement, S21, dated 8th December 1995, she waited outside Mr Tate's address for him to return). In addition, it could be presumed that Mr Tate had house keys in his possession when he left the house and locked up the premises (leaving a note for Miss Carey).
84. The Commission observes that this anomaly regarding Mr Tate's house keys has been known about since December 1995. The Commission has not discovered any new evidence which advances the issue any further. In the absence of such new evidence, Mr Steele's submissions on this point cannot form the basis of a referral to the Court of Appeal.
85. Mr Steele argues that the absence of house keys must mean that they were taken from Mr Tate after the murders - i.e. evidence was removed from the crime scene. It has also been suggested that one or more mobile telephones may have been removed from the crime scene (e.g. mobile telephone 0585 249316 - associated with Mr Tate and with Liz Fletcher, one of his girlfriends - or one of the handsets that had previously been associated with Mr Rolfe). The Commission

considers it to be pure speculation that items have been removed from the crime scene; there is no evidence to support such a contention. In the absence of any new evidence on this point, Mr Steele's theory cannot give rise to a real possibility that the convictions would be overturned by the Court of Appeal.

86. Issue five: Submissions in relation to telephone data

(Point 1) The applicants submit, relying on the expert report of David Bristowe, dated June 2007 (and revised in October 2007), that the trial jury was misled on the issue of whether or not the victims answered any incoming calls to their mobile telephones after the critical 18:59 call between Jack Whomes and Darren Nicholls on 6th December 1995. It is further submitted that the Court of Appeal erred on this subject, when it was considered in February 2006. At paragraph 10 of its 2006 judgment, the Court of Appeal stated: "the case for the prosecution was that the murders took place between 18.48 and 18.59 and that the telephone evidence supported this; it is a fact that the mobile phones of the deceased men did not make or receive effective calls after that time". David Bristowe has argued that it would have been more accurate to state that there was "no sound evidence put before the court that the deceased men did or did not make or receive any calls after that time" (paragraph 6 of 2007 report).

87. In relation to Mr Tucker's phone '327', Mr Bristowe states that the jury should have been informed that both the itemised billing and the "Vodafone Toll Ticket" beacon data only registered calls which Mr Tucker could be charged for, i.e. outgoing calls, and incoming calls which were passed to his voicemail. By way of illustration, Mr Bristowe points out that calls from 01268 558162, which Mr Tucker answered at 12:21 and 14:02 on 6th December 1995, did not appear in the Vodafone Toll Ticket beacon data for his phone (paragraph 9.3 of 2007 report). Mr Bristowe contends that Vodafone would have had no record of incoming calls to Mr Tucker's phone which were not passed to voicemail. He adds that this leaves open the possibility that Mr Tucker answered incoming calls after 19:00 on 6th December 1995. The Commission has considered this submission and takes the following view. Even if it is correct that the available records do not rule out the possibility of post-19:00 incoming calls which were answered by Mr Tucker, there remains no positive evidence that he did in fact answer such calls. In the absence of evidence on the point it is difficult to see how this submission could give rise to a real possibility that the Court of Appeal would overturn these convictions. In addition, the Commission observes that there was other evidence which suggested that it was highly unlikely that Mr Tucker answered his phone after 19:00 on 6th December 1995, namely, the 26 unanswered messages on Mr Tucker's voicemail (a number of those messages expressing extreme concern about Mr Tucker's wellbeing).

88. It appears to be accepted that incoming calls to mobile phone '923' which were answered by Mr Tate *would* have appeared in the beacon data for that phone; however, the applicants make a different submission in relation to mobile phone 923. It is alleged that the only reason that the beacon data for mobile phone 923 ended at 18:44, was because Essex Police placed time parameters on their request - i.e. they only requested data up until 7pm on 6th December 1995. The Commission has been urged to obtain the original application for beacon data in relation to Tate's mobile phone 923. The Commission has sought this application, but has been unable to locate it within the files of Essex Police. The Commission asked Essex Police to comment upon this issue, and was provided with the following written response, on 29th July 2010:
- "Although there is evidence within the case papers that cell site (beacon) evidence was obtained for the mobile telephone of TATE, no application for this data has been identified. This offence was committed 'pre-RIPA' and as such Single Points of Contact (SPOC) did not exist and there was no formalised system for such data applications, indeed it is my belief that Essex Police as an organisation had never before used this material either for evidential or intelligence purposes. At most that telephone companies would have requested for [s/c] was a data protection form but they would very often provide the information as a result of a verbal request. Although it cannot be stated with certainty it is possible that this material was provided after a verbal request."
89. The Commission has considered the response of Essex Police on this issue and takes the view that it is reasonable, given that there was no formal system for requesting beacon data in December 1995. Although the Commission has been unable to locate any application in respect of beacon data for Mr Tate's mobile phone 923, the Commission has been able to form a view of the applicants' submission that Essex Police must have placed time parameters on the beacon request. In the context of everything the Commission has seen in the course of its review, it considers it to be highly unlikely that this submission is correct. The Commission notes that the beacon request in respect of Tucker's phone 327 did not include a 19:00 time limit, and the request for billing data for phone 327 specified the period "between 14:51 06/12/95 and 08:00 07/12/95" (see police action A166). If Essex Police had decided to place time restrictions on requests for data in relation to the victims' phones, it seems inconceivable that they would have neglected to include the time restriction when requesting data for Tucker 327.
90. In support of their submission regarding time restrictions on call data requests, the applicants point out that the witness statement of Barry Dorman states that he called Mr Tate's mobile phone 923 on the morning of 7th December 1995 and it was answered by a woman - this call did not feature in the disclosed beacon data for Tate 923.

The applicants submit that this shows that time parameters were placed on the beacon request. The Commission considers that, even if this is true, it does not follow that a 19:00 limit was placed on the request. A beacon request which was in similar terms to the one made for Tucker 327 (i.e. data up until 08:00 on the 7th December 1995 - an entirely reasonable limit given that this was when the victims' bodies were discovered) would also result in data which omitted the Barry Dorman call (and which also omitted reference to calls which Tate 923 was later found to have received on 8th, 14th and 18th December 1995).

91. In further support of their submission regarding time restrictions on call data requests, the applicants seek to rely upon the witness statement of David Yeadell of Orange Plc, dated 7th August 1997 (see Appendix 5 of David Bristowe's report dated 14th July 2009). Mr Yeadell states that on 23rd July 1997 he received a request from Essex Police under Section 28(3) of the Data Protection Act 1984 in relation to Mr Tate's mobile 923. The request was for call data "10:19 to 18:44 hours on 6th December 1995". The Commission has considered Mr Yeadell's statement, but takes the view that the approach by Essex Police which he describes is likely to relate only to their efforts to place existing call data for Tate 923 in an evidential format which could be relied upon at trial (i.e. presented by an employee of the telecommunications company who provided the data). The Commission understands that Mr Yeadell would have been able to draw on previously retrieved and saved data, rather than having to conduct a new search of Orange's systems (any data which had not previously been secured was unlikely to be in existence by July 1997). Consequently, the Commission does not consider that Mr Yeadell's statement assists in determining whether or not Essex Police included time parameters in their December 1995 request for beacon data in relation to Tate mobile 923.
92. In further support of their submission regarding time restrictions on call data requests, the applicants seek to rely upon three pages of a document entitled "Cellular Billing System" in relation to mobile telephone 0585 249316 ("mobile 316", a telephone which, at one stage at least, had been attributed to Mr Tate). This appears to be the result of an intelligence search by Essex Police on 12th December 1995. It purports to provide details of all outgoing calls for that phone between 1st November 1995 and 23:59 on 8th December 1995, and yet it lists the last call as having been made at 12:32 on 6th December 1995. The applicants have provided the formal BT telephone bill for mobile 316, in order to show that the last call on 6th December 1995 was actually at 21:41 not 12:32. It is submitted that the Cellular Billing System results are evidence that Essex Police were placing time parameters on their requests for data, to avoid any evidence of calls having been made by the victims after

19:00 on 6th December 1995 (this was at a time when police believed that Mr Tate was using mobile phone 316 on the day in question - see police message M271). The Commission has considered this submission but takes the view that it cannot be correct. The formal BT telephone bill for mobile phone 316, which the applicants have sent to the Commission, formed exhibit 'ESD/1' at trial. The Commission considers that, if Essex Police had placed time restrictions on their request for data regarding mobile phone 316, then they would not have requested and then exhibited the billing which formed ESD/1. In any event, the fact that the Cellular Billing System results are stated to be for 1st November 1995 to 23:59 on 8th December 1995 shows that, although there appears to be missing data, the time parameters were *not* restricted.

93. Having considered all of the applicants' submissions in relation to time restrictions on call data requests, the Commission takes the view that they do not give rise to a real possibility that the convictions would be overturned by the Court of Appeal if the case were referred.
94. (Point 2) The applicants submit that Essex Police's interrogation of the victims' mobile phone handsets was inadequate, particularly the attempts to interrogate Mr Tucker's handset, of which DC Miller stated: "I was unable to power up the telephone due to heavy blood contamination. I was therefore unable to extract any information from the telephone" (witness statement S83D, dated 23rd August 1996). As a result of this submission, the Commission arranged for handsets PSB/44 (attributed to Mr Tucker) and PSB/43 (attributed to Mr Tate), together with their associated SIM cards, to be interrogated using modern mobile phone forensic techniques. The testing was carried out by Dr James Luck, Senior Technologist at the Metropolitan Police Digital & Electronics Forensic Service. Dr Luck provided his results to the Commission on 19th April 2010, and these were disclosed to the applicants on 6th May 2010.
95. Dr Luck's interrogation resulted in the retrieval, from the memory of each of the two handsets, of the telephone numbers for dialled, received and missed calls (although he could not definitively say which category of call each of the numbers fell into). Unfortunately, Dr Luck confirmed that neither of the handsets was capable of storing the times or dates of the calls. In those circumstances, the Commission does not consider that the results of Dr Luck's interrogation are capable of assisting in the determination of whether either of the victims made or answered telephone calls after 18:44 on 6th December 1995.
96. Having received Dr Luck's results, the Commission considered that the only conceivable way of making further enquiries into the dates and times for the dialled and received calls to and from the victims'

mobile phones, would be to analyse the itemised billing data for each of the telephone numbers which were retrieved from the memory of the handsets. Consequently, the Commission has analysed itemised billing for the following telephone numbers:

- 0973 195361 (attributed to Paul Edwards)
 - 01375 480213 (attributed to Donna Jagers)
 - 01277 811167 (Telephone kiosk at the 'Halfway House')
 - 01268 520537 (Basildon Tyre Services)
 - 01473 830370 (payphone near to the Sorrel Horse public house in Barham, Ipswich)
 - 01268 558162 (Tucker's home number)
 - 0973 396781 (attributed to Michael Bowman).
97. None of the itemised billing which has been analysed has revealed any post-18:44 calls to either of the relevant victims.
98. The Commission has been unable to locate any itemised billing data for the following telephone numbers (the remaining numbers retrieved from the handsets by Dr Luck):
- 01268 581709 (landline of Craig Rolfe's mother)
 - 01268 288483 (payphone of the Oasis public house in Basildon)
 - 01268 558221 (attributed to Barry Dorman)
 - 0860 666669 (attributed to Ray Sullivan)
 - 0171 3797106 (attributed to Ray Sullivan)
 - 0171 5155060 (attributed to Ray Sullivan)
 - 0956 957387 (attributed to Donna Garwood)
 - 0973 200200 (attributed to Paul Cheveau)
 - 01268 454521 (landline of Donna Garwood's mother)
 - 01703 861942 (Donna Garwood's work number).
99. Having considered all of the available data (and the representations of Mr Whomes, Mr Steele and Mr Bowen) on this issue, the Commission takes the following view. There remains no evidence of any calls made or answered by any of the victims after the 18:44 call. There is nothing in the applicants' submissions regarding the PSB/43 and PSB/44 handsets which is capable of giving rise to a real possibility that the Court of Appeal would overturn the convictions in this case.
- 100.(Point 3) The applicants have referred to the two phone calls made by Mr Steele to Mr Whomes at 18:03 and 18:09 on 6th December 1995. It is pointed out that the Crown claimed that the calls were

made from the car park of the Halfway House public house; however, both of the calls were served by the Childerditch beacon, and it is said that this would not have been possible if they had been made from the Halfway House. The Commission observes that this point was analysed at trial (see paragraph 3.5 of David Bristowe's report of 4th November 1997 and summary of his trial evidence at pages 32-35 of transcript of summing-up for 12th January 1997). It also featured in Mr Steele's grounds of appeal for the 1999 application to the Court of Appeal, and in David Bristowe's expert report for the 2006 appeal to the Court of Appeal (see paragraph 1.20 of report dated 01/05/2002). The submission is therefore not new for the Commission's purposes (see page 2, paragraph i above) and cannot form the basis of a referral to the Court of Appeal.

- 101.(Point 4) It is submitted that Mr Bristowe's tests have now proved that it would have been impossible for Mr Tate to receive the 18:44 call from Sarah Saunders via the Wickford transmitter if he was located in or near to Workhouse Lane at that time (see section 4 of Mr Bristowe's 2007 report). This submission would appear to be based upon testing which Mr Bristowe carried out prior to trial in 1997 (see paragraph 3.6 of his report dated 26th September 1997, and paragraph 4.3 of his June 2007 report). At paragraph 4.4 of Mr Bristowe's 2007 report he states:

"More recently I have carried out further analysis and tests on the service provided by cell identity 1404, from the Orange cell site ESX0066 [i.e. Wickford]."

However, Mr Bristowe does not give any specific details of the "further analysis and tests" that he has carried out, except to mention that he has carried out a "study of the topography" which shows that there is no "line of sight path between the Wickford cell site and any part of Workhouse Lane".

102. The Commission does not consider that there is any new evidence on this point which was not available at the time of trial in 1997 and at the time of the appeals to the Court of Appeal in 1999 and 2006. In any event, although Mr Bristowe was not able to pick up the Wickford transmitter when he carried out tests in Workhouse Lane in September 1997, the Commission does not consider that this shows that it would have been *impossible* for Tate's phone to have picked up the Wickford transmitter in December 1995. The Commission observes that:

- It was recognised at trial, and then again before the Court of Appeal in 2006, that it was extremely difficult to replicate the exact conditions which would have existed for mobile phone usage in the area in question on the evening of 6th December 1995. As the Court of Appeal explained in 2006 (paragraph 48 of judgment): "it is exceedingly difficult to identify the variable conditions prevailing on any particular previous occasion; thus

one cannot say whether any particular call is more likely to be routed to one cell site than another; all that can be said is whether it is possible for it to have happened”;

- When giving evidence at trial (see pages 48-50 of transcript of summing-up for 14th January 1998) Mr Bristowe acknowledged that variations in any of the following factors might have had some effect on which beacons calls were routed through on separate occasions: erection of buildings, growth of foliage, the type of handset used, the orientation of the handset during the call including position within a vehicle, the presence of other motor vehicles, the prevailing weather conditions, the precise geographical position and elevation above the ground. Mr Bristowe added: “I am the first to admit that mobile phone evidence of this kind is an imprecise art” (*ibid*, at page 50);
 - On appeal in 2006, the Court of Appeal emphasised another important variable, namely: “each cell site has only so many available channels; if all the channels on the cell site are being used by other callers, then the computers will automatically switch the call to another cell site; thus whether a call is routed to one cell site or another will be affected by the volume of telephone traffic at that particular time. Volume of telephone traffic is peculiarly variable and unpredictable, but is often at its heaviest during the evening rush hour” (paragraph 46 of judgment);
 - When giving evidence at trial, Simon Collins (a telephone expert called by the prosecution) stated: “trying to plot where people are by mobile telephone evidence is near enough impossible. You are dealing with likelihood and possibilities and it is very complicated” (see page 14 of transcript of summing-up for 14th January 1998).
103. For all of these reasons the Commission does not consider there to be a real possibility that the Court of Appeal would find it to have been *impossible* for Mr Tate to have received the 18:44 call via the Wickford transmitter if he was in Workhouse Lane at the time.
104. Even if Mr Bristowe’s opinion regarding the 18:44 call were accepted, however, the Commission does not consider that this would advance matters significantly. Mr Bristowe’s conclusion in relation to the 18:44 call is:
- “When Pat Tate received the call from Sarah Saunders at 18:44 he might possibly have been in the Rettendon area but he could not have been in Workhouse Lane, either at the beginning of the call or at the end of the call” [paragraph 4.5 of 2007 report],
105. The Commission takes the view that, even if Mr Bristowe were correct that Mr Tate was “in the Rettendon area” rather than

specifically in Workhouse Lane at the time of the 18:44 call, this would not raise a real possibility that the Court of Appeal would overturn the convictions. The Commission acknowledges that Mr Nicholls' trial evidence was that Mr Steele told him Mr Tate took the 18:44 call when they were in the lane, but the Commission notes, once again, that Mr Nicholls was giving a 'second-hand' account of what he claimed to have been told by Mr Steele, and any alleged discrepancies must be assessed in that context.

106. (Point 5) The applicants seek to rely on the beacon data in respect of Mr Whomes and Mr Nicholls for 6th December 1995, which shows that two short calls were made by Whomes to Nicholls at 18:59 on that date. The applicants submit that this reveals a discrepancy in Nicholls' account of events, which has only ever referred to one telephone call from Mr Whomes at 18:59. The applicants add that, for both calls to register on the cell site beacons, Nicholls would have had to answer them by 'flipping' open his phone each time.
107. The Commission has considered this submission but observes that Mr Nicholls was cross-examined at trial by Mr Lederman QC about the number of calls which he remembered receiving from Mr Whomes (Mr Whomes has acknowledged this, in the course of his communications with the Commission). This point therefore does not constitute new evidence or argument for the Commission's purposes. In any event, the Commission also notes that Mr Whomes, in his own trial evidence, insisted that he only made one call to Darren Nicholls at 18:59 (see page 49 of the transcript of summing-up for 14th January 1998).
108. In his submissions to the Commission Mr Whomes argues that the reason Mr Nicholls referred to one 18:59 call rather than two was because he was coached in his account by his interviewing officers, who were working from a telephone 'action pack' during the interviews. The action pack was drawn up from billing data, and so it would only have referred to one call (the shorter of the two calls was too brief to have been charged for by Mr Whomes' phone company). The Commission has considered this submission, but takes the view that it is pure speculation. The Commission has seen no evidence that Nicholls was coached by the officers in this (or any other) part of his account. The beacon data reveals as a fact that two calls were made; it was open to both Mr Whomes and Mr Nicholls to give their own recollection of how many calls there were, and they both did so in their evidence at trial. The Commission takes the view that this submission does not give rise to a real possibility that the Court of Appeal would overturn the convictions if the case were referred.
109. (Point 6) It is submitted that the schedules of telephone evidence which were prepared for trial by Essex Police were manufactured to underpin Nicholls' testimony by omitting, switching and inaccurately attributing data. The Commission has considered all of the

applicants' submissions in relation to the telephone schedules but takes the view that the points raised are not new for the Commission's purposes. When the Court of Appeal considered the applicants' renewed application for leave to appeal against conviction in January 1999, the Court stated:

"In ground 8 it is argued that the judge wrongfully admitted evidence which was inaccurate in detail and used to corroborate false claims by the prosecution. This relates in the main to schedules of telephone calls, which were laid before the jury. It may very well be that there were errors in such schedules; it would indeed be surprising if there were not. It does not however appear, in particular so far as the telephone calls on the day of the alleged murders are concerned, that there were errors which in any way put a false gloss on the case" [see page 8 of Court of Appeal judgment],

110. Mr Steele's submissions in relation to alleged manipulation of trial telephone schedules were also considered during the Commission's first review of his case. When the Commission referred the case to the Court of Appeal, on 15th December 2004, it expressed the view (at paragraph 93 of Mr Steele's referral Statement of Reasons) that there was "nothing to this submission beyond the argument presented to the Court of Appeal on Mr Steele's application for leave to appeal". It is in this context that the Commission has considered Mr Steele's numerous renewed submissions in relation to telephone schedules. The Commission's responses to individual submissions appear below.

111. 'Omission' of data. The applicants have pointed out that telephone data reveals that Mr Tate was in contact with Paul Edwards on the evening of the murders (most notably the last call made by Tate mobile 923, at 18:26 that day), and that Mr Tucker was in touch with Ray Sullivan and Michael Bowman on the afternoon/evening of the murders (in relation to the submission that these individuals were involved in a plot to murder Tate, Tucker and Rolfe, see paragraphs 194-195 below). The applicants highlight that none of these calls feature in the trial schedules of telephone evidence. It is submitted that police withheld details of these calls from the schedules as a way of concealing all references to Edwards, Sullivan and Bowman.

112. The Commission has considered this submission, but observes that it was made clear to the jury that the trial schedules only included calls between specified telephone numbers. For example, the schedule labelled exhibit JMW/2 only featured calls between telephones listed on the laminated sheet for that exhibit (which did not include the telephones of Edwards, Sullivan or Bowman). The trial judge explained the general concept to the jury in the following terms (see page 63 of the transcript of summing-up for 12th January 1998):

“The main schedule of course does not include every call. It only includes calls to another number on the schedule of names set out in the plasticized schedule, exhibit 249. You know that there are 31 names there. Outside calls are not included of course, just calls between those 31 numbers.”

113. In the light of this clear direction, the Commission does not consider that it can be said that the trial jury was in any way misled about the nature of the trial schedules or the telephone calls which they included. In any event, although the Edwards, Sullivan and Bowman calls were not included in the trial schedules, the *fact* of those calls was disclosed to the defence, since they appeared in the itemised billing and beacon data for the victims’ phones. It was open to the defence to prepare their own telephone schedules - which emphasised the Edwards, Sullivan and Bowman calls - if the defence wished to do so. The Commission does not consider that the submission regarding the Edwards, Sullivan and Bowman calls gives rise to a real possibility that the Court of Appeal would overturn the convictions in this case.

114. The applicants also submit that the trial schedules omitted reference to a call made by mobile 316 to landline number 01702 339636 (the family home of Liz Fletcher, a girlfriend of Mr Tate) at 21:41 on 6th December 1995. The applicants state that the fact of this call did not become known to them until a detailed schedule of calls entitled “All phone calls for 6th December 1995” (dated 15th January 1996) was disclosed to them prior to the 2006 appeal to the Court of Appeal. The applicants submit that this 21:41 call shows that Mr Tate was alive and making telephone calls well after 7pm on 6th December 1995, and that this severely damages Mr Nicholls’ version of events.

115. The Commission has considered this submission but observes, once again, that the reason the 21:41 call does not appear in the trial schedule JMW/2 is because that schedule only contained calls between the specific telephones listed on the laminated sheet for that exhibit, and telephone 01702 339636 is not included on that sheet. However, the itemised billing for mobile 316 was exhibited (‘ESD/1 ’) at trial, so the fact of the 21:41 call was disclosed to the defence.

116. The applicants suggest that, notwithstanding the disclosure of the 21:41 call via exhibit ESD/1, the Crown's decision not to include the call in the trial schedule was a deliberate attempt to mislead the jury and to distract attention from a call made by one of the victims well after the time of the murders (as alleged by Nicholls). The Commission does not consider this to be correct. There is no evidence that Mr Tate had mobile 316 in his possession on the evening of 6th December 1995. The only telephone discovered on his person on 7th December 1995 was the one which became exhibit PSB/43 at trial (referred to as 'mobile 923' above). This being the case, there would have been a greater danger of misleading the jury if the 21:41 call *had* been included in the trial schedule. The Commission considers that the available evidence actually points towards Liz Fletcher having had mobile 316 in her possession on 6th December 1995:

- Police message M165 (dated 8th December 1995) details a message from Ann Marie Whitehead [Mr Tucker's girlfriend] that "Tate's old mobile is in the possession of a female called Liz Fletcher";
- DC Winstone's report R8A (dated 11th December 1995) describes attending Mr Tate's home address with Sarah Saunders on 9th December 1995 when Miss Fletcher arrived and returned the "front door keys to the premises, keys to the Mercedes car index E532NMU and **Miss Saunders mobile phone**" (emphasis added). The Commission notes that the telephone bill for mobile 316 was in Sarah Saunders' name. In her police interview on 13th June 1996 (at 13:43-14:17, see pages 13-15 of transcript), Sarah Saunders described the same occasion when, in company with Essex Police, she met Liz Fletcher at Mr Tate's address and Miss Fletcher returned the mobile telephone which was registered in her (Miss Saunders') name;
- The calls for mobile 316 on 6th December 1995 (which appear in trial exhibit ESD/1 and the schedule entitled "All phone calls for 6th December 1995", dated 15th January 1996) are at least as likely to have been made by Liz Fletcher as by Mr Tate. The Commission notes that telephone number 01702 339636, which was Miss Fletcher's home number (registered to Mr W. F. Fletcher), was called twice by mobile 316 on 6th December 1995. This could well indicate Miss Fletcher telephoning her home. In this connection, the Commission also observes that mobile 316 proceeded to call the Fletcher home on the 7th and 8th of December 1995, after Mr Tate's body had been discovered.

117. The Commission notes Mr Steele's submission that the calls from mobile 316 on 6th December 1995 are likely to have been the calls from Mr Tate to Liz Fletcher which are described in Miss Fletcher's witness

statement (S20, dated 8th December 1995); however the

Commission does not consider this to be correct. All of the calls from Mr Tate which Miss Fletcher describes in her statement can be accounted for using the billing for Mr Tate's landline 01268 287131 and the billing for his mobile phone 923. In this connection, the Commission observes that Miss Fletcher's work number was 01702 226347, and not 01702 614170 as suggested in Mr Steele's submissions.

118. In light of the points set out above, the Commission considers that it was entirely reasonable for the 21:41 call from mobile 316 not to be included in the trial schedule of telephone calls. The Commission does not consider that the applicants' submissions on this matter give rise to a real possibility that the Court of Appeal would overturn the convictions if the case were referred.
119. A further alleged omission from the trial telephone schedule is the call from Craig Rolfe's mobile telephone 0378 307404 to an unknown telephone number, 0374 722850, made at 11:09 am on 6th December 1995. Once again, the reason that this 11:09 call does not appear in the trial schedule JMW/2 is because that schedule only contained calls between the specific telephones listed on the laminated sheet for that exhibit, and 0374 722850 was not one of those telephones. In any event, the Commission considers that calls from mobile telephone 0378 307404 on 6th December 1995 are irrelevant, as there is no evidence that this telephone was in Rolfe's possession on that day (see paragraph 126 below).
120. Further alleged omissions from the trial telephone schedule include a call from Mr Steele to the Great Bentley Park telephone kiosk on 11th November 1995 at 10:06, and a call from the Halfway House telephone kiosk to Mr Tate on 5th December 1995 at 17:03.² In both of these instances, the Commission understands that the calls were not included in the trial schedule because the numbers of the kiosks in question were not included on the laminated sheet for exhibit JMW/2. The same is true for calls which were made from Tate's landline 01268 287131 to the landline of Claire Carey (one of his girlfriends), 01702 511087, at 17:15 and 18:06 on 6th December 1995. In all instances the fact of the calls was revealed to the defence, in that the relevant billing was disclosed.
121. The applicants further submit that the trial telephone schedule omitted reference to the calls from Mr Nicholls to Mr Steele on 5th November 1995 at 20:46, and from Mr Nicholls to Mr Steele on 6th November 1995 at 16:36. The Commission notes that these omissions were raised by Mr Steele at trial, and were agreed by the Crown (see, for example, pages 4 and 10 of the transcript of cross-

² Regarding the latter, the Commission notes that the Court of Appeal mistakenly stated, at paragraph 10 of its 2006 judgment, that this call was made on 6th December 1995.

examination of Mr Steele on 11th November 1997, pages 105 and 106 of the transcript of summing-up for 14th January 1998, and page 25 of the transcript of summing-up for 15th January 1998). The Commission also notes, in relation to the 6th November 1995 call, that prosecuting counsel directed Mr Steele to the telephone schedule which was exhibited under reference JMW/108, which *did* include the call in question. The Commission does not consider that there is any new evidence in relation to these 'omitted calls' which could give rise to a real possibility that the Court of Appeal would overturn the convictions now (with regard to Mr Patel's comments upon the omitted calls, in his report dated 20th May 2008, see paragraph 127 below).

122. 'Switching' of data. It is pointed out that Mr Steele's call to the BT payphone at Bedloes Avenue, Rawreth, at 11:53 on 11th November 1995, was in the correct position within an 'unused' trial telephone schedule but incorrectly appears as the last call of the day in the trial schedule. It is submitted that this difference between the schedules shows that Essex Police manipulated the data in an attempt to mislead the jury. The Commission observes that this point was raised by Mr Steele in his trial evidence (see transcript of cross-examination for 11th November 1997 at page 7) and it was accepted by the Crown that the call appeared in the wrong place in the trial schedule. The Commission also observes that, in his application for leave to appeal in 1998, Mr Steele made the submission that this inaccuracy revealed police misconduct and was aimed at deceiving the trial jury. The submission was considered by the Court of Appeal in January 1999, and so is not new for the Commission's purposes. The same is true of Mr Steele's submission regarding the 'reversed order' of two calls timed at 20:39 on 6th December 1995 (one from Mr Steele's landline to Mr Steele's mobile, and the other from his landline to Mr Whomes' mobile). Mr Steele's submission, that the reversal of these calls in the trial schedule was a deliberate attempt by the Crown to undermine his alibi, was before the Court of Appeal in January 1999. The Commission does not consider that there is any new evidence in relation to the 'switching of data' which could give rise to a real possibility that the Court of Appeal would overturn the convictions now (with regard to Mr Patel's comments upon the issue, in his report dated 20th May 2008, see paragraph 127 below).

123. Attribution of mobile telephones. The applicants submit that Essex Police and/or the CPS misled the jury by listing, in the trial telephone schedules, that the Saunders/Tate landline was solely used by Pat Tate, and that the Street/Steele landline was solely used by Michael Steele. It is submitted that Ms Saunders and Ms Street were good friends who used to talk on the phone frequently, but the jury was left with the false impression that all of the calls between these two

numbers were between Mr Tate and Mr Steele. The Commission observes that this point was raised by Mr Steele in his trial evidence (see transcript of cross-examination on 11th November 1997 at pages 5, 6 and 36; Mr Steele also raised the point in re-examination), and so the jury was well aware of it. The Commission also notes that the point (and others of a similar nature) featured in “Ground eight” of the grounds of appeal drafted by Mr Steele in June 1998, and considered by the Court of Appeal in January 1999. It is therefore not new for the Commission’s purposes and cannot form the basis of a referral to the Court of Appeal in the absence of exceptional circumstances.

124. The applicants further submit that Essex Police and/or the CPS wrongly attributed mobile telephones 0973 344913 and 0378 307404 to Craig Rolfe. It is pointed out that the two telephones were actually registered to Mr Rolfe’s brother Michael and to Penelope Hughes (Michael Rolfe’s partner) respectively.
125. In relation to 0973 344913 the applicants will be aware that, although this was registered to Michael Rolfe, there was evidence that Craig Rolfe was a user of the phone for a considerable period of time. According to Penelope Hughes’ witness statement (S167A), dated 9th April 1997, Michael Rolfe had obtained the phone for Craig due to the latter’s poor credit rating; Craig Rolfe had used it for thirteen months but had then lost it a matter of days before he was murdered. Craig Rolfe’s partner, Donna Jagers, also confirmed that he had lost this telephone a few days before he was murdered (see police message M184). Throughout its review of this case the Commission has discovered no evidence to suggest that Craig Rolfe was still in possession of mobile phone 0973 344913 on 6th December 1995. Nor has the Commission discovered any evidence of calls to or from this telephone after 19:00 on 6th December 1995.
126. In relation to 0378 307404, the Commission observes that Penelope Hughes, in her April 1997 witness statement (S167A), stated that she was the sole user of this telephone. The applicants submit that the phone was wrongly described as “Rolfe mobile” in the trial telephone schedules, as evidenced by the call made at 12:04 on 7th December 1995, after the bodies of the victims had been discovered. Whilst the Commission acknowledges that this call was incorrectly attributed to Mr Rolfe (and the same may be true of other calls in the trial schedule), it does not consider that this point in itself gives rise to a real possibility that the Court of Appeal would overturn the convictions in this case.
127. In support of his allegations regarding manipulation of the trial telephone schedules Mr Steele has provided the Commission with an expert report by Ross Patel. The report concludes that anomalies in the telephone schedule cannot be explained as computer errors, but

can only be attributed to manual revision on the part of the computer operator. The Commission has considered Mr Patel's report and makes the following observations:

- Mr Patel does not discuss any anomalies in the trial telephone schedule which have not already been addressed in Mr Steele's own representations (discussed above);
- Mr Patel does not provide any expert analysis in relation to calls which are 'omitted' from the trial telephone schedule (see paragraphs 7.4 and 8.1 of his report); he merely repeats Mr Steele's own submission that there are calls in the unused schedules which do not appear in the trial schedule (the Commission has addressed that submission above). Mr Patel's expert comment solely applies to the sequencing of calls, and the type of separator used between the hours and minutes digits in the schedule (see below);
- Mr Patel highlights individual calls in the trial telephone schedule which used anomalous "separators" between the hours and minutes digits. He refers to the call at 11.53 hours on 11th November 1995, which should have used a full stop as the separator (like all of the other calls in that schedule), but featured a colon instead. The use of a colon caused that call to appear out of sequence in the schedule. Mr Patel states that: "It is simply not possible for a single call record... to be changed individually as a result of any automated formatting". The Commission accepts that this must be correct; and also accepts that any "technical failure" would not cause the separator in a single call record to be changed;
- Whilst it is accepted that the 'anomalous separator' must have been caused by manual revision on the part of the individual who inputted the data, the Commission takes the view that there is no evidence that any such individual acted in bad faith (and evidence of bad faith on the part of Essex Police would be required for any abuse of process argument to succeed). Mr Patel himself states at paragraph 8.1 (point xvii on page 26): "the author is clearly unable to comment as to whether such manual revision may have been done with malicious intent". The Commission also notes again (as explained at paragraph 122 above), that it was accepted by the Crown at trial that the 11.53 call appeared in the wrong position in the trial schedule;
- Mr Patel's concession that he is "unable to comment as to whether such manual revision may have been done with malicious intent" applies equally to the points he makes about the order of certain calls for 6th December 1995 being reversed in the trial schedule;

- None of the points raised by Mr Patel is capable of assisting the Commission (or the Court of Appeal) on the subject of the time of death. Mr Patel's points appear to relate solely to the applicants' allegation that Essex Police manipulated trial evidence.

128. Having considered Mr Patel's report, the Commission takes the view that it does not significantly add to Mr Steele's submissions regarding omissions/ordering/attribution of telephone calls, as considered by the Court of Appeal in January 1999. As the Court acknowledged at that stage, it was not surprising that human error had occurred in the compilation of the schedules. The Commission notes, in this connection, the complexity of the telephone evidence, and the fact that this was one of the first prosecutions to feature such a large volume of telephone data. The Commission does not consider that Mr Patel's report provides any additional support for the allegation that Essex Police 'manipulated' the trial telephone schedule in an effort to mislead the trial jury. In the absence of any evidence of bad faith on the part of Essex Police or the Crown in relation to the trial schedules, the Commission does not consider that the anomalies discussed by Mr Patel give rise to a real possibility that the Court of Appeal will find there to have been an abuse of process in this case.

129. Having considered all of the submissions in relation to telephone schedules (and the expert reports of Mr Patel and Mr Bristowe in support of those submissions), the Commission takes the view that they reveal no new point which is capable of giving rise to a real possibility that the Court of Appeal would overturn the convictions in this case. Even if one or more of the submissions on this subject were new (which is not accepted), the Commission does not consider any of those submissions capable of affecting the key issues in the case, namely: the time that the deaths occurred, and the question of whether Mr Nicholls told the truth in the essential aspects of his account. The Commission considers that this was essentially what the Court of Appeal was referring to in 1999 when it stated that: "It does not however appear, in particular so far as the telephone calls on the day of the alleged murders are concerned, that there were errors which in any way put a false gloss on the case".

130. (Point 7). The applicants submit that the Court of Appeal was wrong to state, in February 2006, that cell site evidence provided compelling evidence for Nicholls' version of events as Nicholls "did not and could not have known" about the cell site data when he gave his account to police (paragraph 41 of judgment). The Commission has considered this submission, but has discovered no evidence which suggests that Essex Police revealed cell site data to Mr Nicholls before he gave his account. Whilst it is clear that Mr

Nicholls was asked questions about itemised billing in police interview at 16:38-17:20 on 17th May 1996 (see page 15 of record of interview) the Commission has seen no evidence that police revealed cell site data to him. The Crown disclosed at trial that Mr Nicholls' interviewing officers had worked from an 'Action Pack' which was in the form of a call schedule drawn up from itemised billing, but there was no suggestion that this included cell site data. The Commission notes that Mr Nicholls was cross-examined at trial about the nature of the telephone data that he was shown in police interview (see pages 100 and 101 of transcript of cross-examination of Nicholls).

131. In making their submission about Mr Nicholls' knowledge of cell site data, the applicants seek to rely upon David Bristowe's expert report of June/October 2007, at paragraph 5.1, where Mr Bristowe points out that Essex Police obtained the relevant cell site data almost five months before Mr Nicholls was interviewed. The Commission acknowledges that this appears to be correct, but it does not follow from it that the data was shown to Nicholls before he gave his account.

132. In further support of the submission regarding Mr Nicholls' knowledge of cell site data, Mr Whomes' and Mr Steele's legal representative, Mr Bowen, relies upon the transcript of the section 19 enquiry interview with DC Winstone, which took place on 30th March 2004. At page 31 of the transcript of the first interview, the following exchange took place:

"Q) Did you at any time coach Nicholls so that his evidence matched the cell site analysis that you're aware of?

A) No definitely not.

Q) Was he ever made aware of the results of the cell site evidence that you're aware of?

A) I don't know sir, I don't th... I don't believe I've made him aware.

Q) Was the knowledge of the cell site analysis part of your interview then?

A) Erm... yes it would have been at some point yeah."

133. The Commission has considered these responses by DC Winstone in the context of his earlier answers in the interview (see pages 24-26 of transcript of first interview):

"Q) When you started those interviews, when Nicholls started to speak about the murders, in terms of locations and all the things that happened can you remember what your depth of knowledge was as a previous member of the Investigation Team regarding the in-depth matters of those investigations like and a good example is cell site analysis and that type of thing or when Nicholls started to speak to you was it effectively fresh to you, he's given you locations

and the route in and the route out and everything, was that completely new to you?

A) Yeah to the best of my knowledge it was completely fresh to me at that stage.

Q) Right so things like the in-depth... bearing in mind that you've got a HOLMES inside team doing loads of work and then you've got the outside teams and bearing in mind that you would have briefings fairly regularly, things like cell site analysis is the best example I can think of, would you have known the in-depth detail of what was going on elsewhere in the investigation?

A) We may have had an overview but the cell site analysis I'm not sure that I knew all the details which I'm... you know I could recall now. That was done by a specific set of people... and I don't recall being specifically told the results of all the analysis... I don't recall the specific details of cell site analysis on specific phones."

134. The Commission notes that DC Winstone was cross-examined at trial (see pages 68-70 of transcript for 3rd October 1997) about the use of telephone data when interviewing Mr Nicholls:

"Q) When you were interviewing Mr Nicholls, did you have in front of you, and available for him to look at, various documents?

A) On some occasions, I believe.

Q) So let me give you some examples. Did you have telephone toll tickets; in other words, the record of calls made between the various people in this case?

A) Yes, sir."

"Q. You see, were you in fact using document toll tickets to assist Mr Nicholls in getting a cohesive story together?

A. The only reason documents were used was to prove or disprove what Mr Nicholls was telling us."

135. The Commission also notes that DC Brown, the police officer who interviewed Mr Nicholls alongside DC Winstone, was questioned at trial about the telephone data which was used in the Nicholls interviews. Although he acknowledged that an interview pack was used, which contained call data, DC Brown denied (see page 23 of transcript for 7th October 1997) that any call data was "fed" to Mr Nicholls before he gave his account of events.

136. The Commission also notes the witness statement given to the section 19 enquiry by Lee Craddock (dated 14th May 2004), a solicitor who represented Mr Nicholls during many of his police interviews. At page 5 of the statement, Mr Craddock stated:

"...it was only some time later [i.e. after the police interviews] that I became aware that the police were to use cell site analysis to plot the movements of mobile telephones. At the time I did not know

that such analysis was possible and I am certain, from Darren Nicholls reactions and questions to me, neither did he.”

137. Having considered the trial evidence of DCs Winstone and Brown, the witness statement of Lee Craddock, and the section 19 interview with DC Winstone, the Commission makes the following observations. Both officers have acknowledged that, as the interview process developed, they gained some awareness of enquiries that were being undertaken in relation to telephone data. Both officers have acknowledged that telephone data formed part of the ‘packs’ which were used when interviewing Mr Nicholls. There is even a suggestion, in DC Winstone’s answer during the section 19 interview (which is relied upon by Mr Bowen), that DC Winstone gained knowledge of the cell site analysis, and that this knowledge informed some of his questioning of Mr Nicholls. However, the Commission has seen no evidence which suggests that either of the interviewing officers revealed cell site data to Mr Nicholls before he began to give his account on 14th May 1996. The Commission notes that the officers specifically denied, both at trial and when asked by the section 19 enquiry, that they had ever coached Mr Nicholls using the cell site data. Mr Craddock has also expressed the view that Nicholls was not aware, at the time of his interviews, that police could plot the movements of mobile telephones using cell site data.
138. In the absence of any evidence that Essex police revealed cell site data to Mr Nicholls before he began to give his account on 14th May 1996, the Commission does not consider that this submission is capable of giving rise to a real possibility that the Court of Appeal would overturn the convictions in this case. In any event, the Commission notes that DCs Brown and Winstone gave evidence before the Court of Appeal in 2006. The applicants were in possession of the section 19 materials prior to the appeal hearing and could have questioned the officers at that stage regarding Mr Nicholls’ knowledge of the cell site data. In all of the circumstances, the Commission does not consider that this submission can form the basis of a referral to the Court of Appeal.
139. (Point 8) The applicants query why the last dialled number on Mr Tate’s landline (according to the memory of the telephone handset - see report R17 dated 11th December 1995 by DC Mayo) is said to have been Mr Tucker’s mobile 327, when the last outgoing call on 6th December 1995, according to itemised billing data, was to Miss Carey at 18:06. The applicants submit that the finding of Mr Tucker’s number on the handset means that Mr Tate’s landline must have called Mr Tucker again after 18:06. They further submit that such a call is most likely to have been made after 22:00 that day, as Miss Carey’s account was that she was outside Tate’s house between 18:10 and 22:00 (and Mr Tate was not there). The Commission has considered this submission but does not consider that there is any

positive evidence of a post 18:06 call by Mr Tate's landline to Mr

Tucker's mobile. In the absence of such evidence, the Commission does not consider that this submission gives rise to a real possibility that the Court of Appeal would overturn the convictions.

140.(Point 9). The applicants submit that the "Audio Tape Recording Transcription of Telephone Mailbox Messages from Mailbox No. 276603194" (i.e. the voicemail messages for Tony Tucker's mobile 327, court exhibit 191 at trial) is an inaccurate transcription of the tape recorded messages for that telephone. It is pointed out, in particular, that the last two messages on the trial transcript were actually only one message on the tape (left at 18:13 on 5th December 1995); and that an additional message was left at 09:57 on 8th December 1995 (featuring background television noise) which is not listed on the trial transcript. It is submitted that these alleged inaccuracies demonstrate "conscious manipulation" of the mailbox transcript by Essex Police, which was deliberately aimed at deceiving the trial court. The Commission has considered this submission and takes the view that, even if the applicants are correct about the inaccuracies in the transcript, this does not amount to evidence of a deliberate attempt by Essex Police to deceive the trial court. Nor, in the Commission's view, are the inaccuracies capable in themselves of giving rise to a real possibility that the Court of Appeal would overturn the convictions in this case.

141.The applicants also make the following arguments in relation to the voicemail for Mr Tucker's mobile 327:

- The fact that he did not answer the incoming call at 19:09 on 6th December 1995, does "not equate to Tony Tucker being dead and unable to answer his mobile phone", as he may have had his phone turned off, or had no network signal, or been engaged on another incoming call;
- The 19:09 caller did not leave a message for Mr Tucker, so he would not have received an alert from his voicemail, and this could explain why he did not return the call;
- In any event, searches of the relevant billing data illustrate that Mr Tucker often failed to respond to messages left on his voicemail.

142. The Commission has considered the applicants' submissions on this issue (which could all have been raised at trial), and takes the view that they add nothing to the evidential position as set out for the jury. It remains the case that there is no evidence that Mr Tucker made or answered any calls after 17:07 on the day in question. Whilst, on its own, this does not "equate to Tony Tucker being dead and unable to answer his phone" at 19:09, the absence of any evidence of Mr Tucker using his telephone after 19:09 was a legitimate aspect of the case for the jury to

consider. These submissions do not give rise to a real possibility that the Court of Appeal would overturn the convictions in this case.

143. Issue six: Statement S177, which is alleged to be an undisclosed witness statement by Darren Nicholls.

It is submitted by the applicants that there exists a witness statement by Darren Nicholls (S177) which has never been disclosed to the defence, and which should be obtained by the Commission now.

144. In the course of its enquiries, the Commission has established that S177 is registered to the HOLMES nominal index of Darren Nicholls; however, there is no associated document which can be opened when S177 is selected on the system. The Commission's enquiries have also established that there is no witness statement in the paper files of Essex Police which corresponds to S177. Both in the paper files, and on the HOLMES system, the first statement by Mr Nicholls is the one which was registered as 'S177A'. According to the record on HOLMES, S177 was registered on the 20th May 1996, and it is described as having been 'registered in error'. Mr Nicholls was in custody on 20th May 1996, but did not make his first witness statement until 21st May 1996. The question that therefore arises is "How could the police register a statement to Mr Nicholls before they knew that he was going to provide witness evidence?"

145. The Commission has considered this matter at length. Essex Police have been asked to provide an explanation and expert HOLMES opinion has been sought by the Commission in relation to this anomaly. Essex Police have conceded that they do not know the definitive answer to this and have considered a number of theories. The Commission has sought to find a technical explanation by considering the potential for there to be an audit record behind the HOLMES system which could shed some light on the matter. The HOLMES system was upgraded to HOLMES2 some time after the investigation of this case and the original HOLMES account was converted to HOLMES2 for current access. HOLMES2 has a fully accessible audit system which records all transactions on the account during the period of its usage. Unfortunately the original HOLMES system had no such facility and cannot, therefore, provide any assistance in this matter.

146. However, at a meeting between the Commission and Essex Police, on 4th August 2010, a hypothesis was presented that could explain this anomaly. The investigation in this case was managed on two HOLMES accounts - one for the drug importation matters and another for the murder investigation. Both ran simultaneously from a common major incident room and they were cross-referenced to each other. This meant that they were searchable but any data could only be entered onto one of the accounts at a time, by

separate processes.

147. HOLMES automatically generates the date that material is entered onto the system, and that date will often be different to the date that the material was actually obtained. This is due to the fact that a document has to pass through the Major Incident Room (MIR) system of document management before it passes into the hands of an Indexer who actually inputs it. Because of the sheer volume of material that passes through an incident room the inputting of material is prioritised so that material requiring actions to be raised takes precedence over other material. Essex Police have now analysed material obtained from Mr Nicholls early in the investigation. It falls into two categories, records of interview and witness statements. All documents on HOLMES have a prefix relevant to the type of material involved. On HOLMES2 interview records are registered under the prefix 'Y', witness statements under the prefix 'S', exhibits under 'X', and other documents under 'D'. The original HOLMES system had no specific prefix registration for interview records. Each police force therefore had to determine its own arrangements to register interview records. It was common practice in many forces to use the prefix 'D' for interview records and equally common in others to use 'S'. Some forces preferred to treat all interview records as an exhibit.
148. The practice in Essex Police was to register interview records under the 'S' prefix. It appears that S177 was the first point at which any documentation was registered to Mr Nicholls. This registration took place on the murder account. The explanation presented by Essex Police is that a decision was made at some point to register all of Mr Nicholls' interviews on the drugs account. The interview records were not immediately registered to that account because it is unlikely that they would have yet been transcribed. It is suggested that S177 was in fact an interview record that an indexer registered to the murder account and then either realised or was told that this was an error and it should be registered to the drugs account. Examination of the drugs account confirms that all of Nicholls' interviews were registered to that account starting at S21 to S21P. The first of those interviews was registered on 20th May 1996, the same day that S177 was registered on the murder account, which tends to support the view that it was this interview record that was being registered that day.
149. S21 is not the first interview conducted with Nicholls, it is the third. The previous two interviews, dated 13th and 14th May 1996, were 'no comment' interviews. These were not registered until some time later (12th June 1996). The explanation proffered for this is that S21 was the first interview in which Nicholls gave any information regarding the murders and the part he played and it, and subsequent interviews, would have been treated as a higher priority as far as their progress through

the MIR system was concerned.

150. The Commission is of the view that this explanation is both credible and logical and is consistent with the Commission's knowledge and understanding of major incident management and the HOLMES system. The Commission has found no evidence that there was any bad faith on the part of the investigators relating to S177. However, the Commission is aware that where documents are registered in error on a HOLMES account it has been recognised as good practice for there to be a record kept of the decision to "error" a document explaining, briefly, the rationale for doing so and the individual who authorised that decision. This process is specifically catered for in the Major Incident Room Standardised Administrative Procedures (MIRSAP) published in 2005 but not in previous versions. Examination of the database in this case shows that the policy in relation to error documents was inconsistent, with some being managed in accordance with that good practice and others not so. In the light of this the Commission does not attach any particular significance to the fact that the reason for registering S177 in error was not fully recorded at the time.

151. Issue seven: The allegation that Essex Police colluded with and coached Darren Nicholls in his account of events.

Mr Whomes' and Mr Steele's representative, Mr Bowen, has made numerous submissions which allege that Mr Nicholls was coached in his account of events by Essex Police. In connection with these submissions, Mr Bowen alleges that the police interviews with Nicholls in which he first gave his account of the night of the murders, were not carried out on 14th May 1996, as recorded by police, but at a later date. It is submitted that this "backdating" alone would demonstrate that the investigation was corrupt and the resulting convictions unsafe. It also leaves open the possibility that there were earlier "off tape" meetings with Nicholls, in the course which he was coached with a story.

152. The Commission observes that Mr Bowen has provided voluminous arguments in support of his submission that Nicholls' interviews were backdated, but the Commission has seen no evidence which supports this serious allegation. The submission remains unsubstantiated speculation, and does not give rise to a real possibility that the Court of Appeal would overturn the convictions in this case. The Commission also notes that Mr Nicholls was represented by a solicitor, Mr Craddock, at many of the interviews in question. Mr Craddock has denied, both in evidence at trial and in his statement to the Commission's section 19 investigation in 2004, that there was anything improper about Mr Nicholls' police interviews. In order for the applicants' allegation about backdating to be correct, Mr

Craddock would have had to be complicit in any impropriety on the part of Essex Police. For the avoidance of doubt, the Commission has discovered no evidence that Mr Nicholls' interviews were conducted in an improper manner; nor has the Commission discovered any evidence that Mr Craddock has been untruthful in his recollections about the interviews. Mr Bowen has pointed out that Mr Craddock was a police officer before he became a solicitor, but the Commission does not consider that this makes it any more likely that he has behaved improperly in this case; nor does it mean that Mr Craddock cannot be trusted in his account.

153. In support of his submission regarding the alleged backdating of interviews, Mr Bowen relies on Mr Nicholls stating (in 'interview 7' on 17th May 1996 at 10:11) that "someone had been charged with being in possession of a shotgun". Mr Bowen points out that Mr Steele was not charged with possession of a shotgun until 22:42 on 17th May 1996, and so argues that 'interview 7' must have taken place after this time and been "backdated". The Commission notes that this submission arises from material (namely Mr Nicholls' interview records) which was available at trial, and it could have been utilised in cross-examination of Mr Nicholls and his interviewing officers at that stage. In any event, having considered the submission, the Commission takes the view that there is no real possibility of it leading the Court of Appeal to find that the interview transcripts for 17th May 1996 were backdated, or that there was anything improper about the way Mr Nicholls' interviews were conducted by Essex Police. In this connection, the Commission notes again that Nicholls' solicitor Mr Craddock was present at all interviews on 17th May 1996.

154. As explained above, Mr Bowen alleges that Nicholls' interviewing officers questioned him "off tape". He refers, in particular, to alleged off tape discussions on 16th and 17th of May 1996. This submission arises from cross-referencing Mr Nicholls' custody record for those dates with the transcripts of his police interviews on 17th May 1996. These documents were disclosed to the defence at trial and, as pointed out by Mr Bowen, DC Brown and DC Winstone were cross-examined at trial about off-tape conversations with Nicholls. The submission is not new for the Commission's purposes and cannot form the basis of a referral to the Court of Appeal in the absence of exceptional circumstances. In any event, the Commission has discovered no evidence that Mr Nicholls was ever coached in his account by Essex Police.

155. The Commission notes that Mr Nicholls' solicitor, Mr Craddock, has stated that as far as he is aware Mr Nicholls was never coached or spoken to off tape regarding his account of events. However, Mr Bowen submits that Mr Craddock's statement for the section 19 investigation

actually supports the submission that Mr Nicholls was interviewed off tape. Mr Bowen highlights page 5 of the statement, where Mr Craddock describes the interviewing officers asking Mr Nicholls "various questions about what mobile telephone he was using at the time of the offences and as to whether he was carrying it and whether it would have been turned on or off". Mr Bowen states that such questions do not appear anywhere in the Nicholls interview transcripts, and that this supports his submission that Mr Nicholls must have been questioned off tape. The Commission does not consider this submission to be correct. In the Commission's view, the line of police questioning which appears at pages 15 to 21 (page 19 in particular) of the interview transcript for 17th May 1996 at 16:38, contains the "various ^questions about what mobile telephone [Mr Nicholls] was using at the time of the offences" which are referred to in Mr Craddock's statement. There is no real possibility, in the Commission's view, that the Court of Appeal would find Mr Craddock's statement to support the submission that Mr Nicholls was spoken to off tape. In any event, Mr Craddock's section 19 statement was available to the applicants and to the Court of Appeal in 2006, and it was open to the applicants to pursue this point at that stage.

156. In further support of the submission that Mr Nicholls was spoken to 'off tape' by Essex Police, Mr Bowen has drawn the Commission's attention to a "faxed summary" of the case against the applicants (faxed on 22nd May 1996). This summary refers to details of the events of 6th December 1995, purportedly obtained from Mr Nicholls, but which do not appear in Mr Nicholls' answers during police interview. In particular, Mr Bowen refers to references to a "blue Range Rover", and an allegation by Mr Nicholls that Mr Steele had referred to Mr Whomes as an "evil cunt" when describing the killings. Neither of these points appears in Mr Nicholls' police interviews, which simply refer to a "Range Rover" and Mr Steele's alleged comment that Mr Whomes was "a cold hearted bastard". Mr Bowen adds that references to a blue Range Rover *do* appear in the briefing notes of DC Shakespeare (16th May 1996), and that DC Shakespeare repeated "blue Range Rover" when putting Mr Nicholls' account to Mr Steele in interview on 17th May 1996. Furthermore, according to Mr Bowen's note, prosecuting counsel John Butcher referred to Mr Nicholls' description of a "blue Range Rover", when summarising the case at the first remand hearing at Chelmsford Magistrates' Court on 18th May 1996. Mr Bowen submits that, since these words didn't come from Mr Nicholls in the disclosed police interviews, Mr Nicholls must have discussed the case with officers off tape, or in recorded interviews which have not been disclosed. Mr Bowen also points out that the vehicle is referred to as a "dark Range Rover" in police summary document D56. Mr Bowen submits that Essex Police attempted to cure these discrepancies over vehicle colour, by coaching Mr Nicholls to refer to a "dark coloured or blue Range

Rover” in his witness statement S177A. Mr Bowen also submits that Essex Police removed the anomalous reference to Mr Steele describing Mr Whomes as “an evil cunt” when the case was summarised in police document D56. Mr Bowen relies upon the fact that the text in D56 reads “an cold hearted bastard” (emphasis added), which suggests that the text has been amended.

157. The faxed summary that Mr Bowen seeks to rely upon appears to be part of the faxed antecedent history of Mr Steele as provided by Essex Police for the benefit of the prison authorities. This summary would have had no evidential standing whatsoever, as opposed to Mr Nicholls’ account of events as given in police interview and then in evidence at trial. In any event, whilst the discrepancies which Mr Bowen highlights may indicate that Mr Nicholls has been misquoted in the faxed summary (the Commission acknowledges that the “evil cunt” comment appears to have been amended to “cold hearted bastard” in the D56 summary), this does not necessarily indicate that Mr Nicholls gave a conflicting account ‘off tape’. The same is true of the reference to the colour of the victims’ Range Rover - the colour of the vehicle which was discovered in Workhouse Lane would have been well known to police officers dealing with the case, and the inclusion of the word “blue” is far more likely to be an error on their part than an indication that Mr Nicholls gave further details ‘off tape’. In all of the circumstances, the Commission takes the view that Mr Bowen’s submissions on this issue do not give rise to a real possibility that the Court of Appeal would find that Mr Nicholls was spoken to ‘off tape’ and coached in this account.

158. In support of his allegation that interview records have been fabricated, Mr Bowen queries why “Error! Reference source not found” appears at the top each page of certain Nicholls interview transcripts. The Commission understands that this error message occurs when a form field is deleted rather than written within in the normal way (see article dated 5th October 2007, disclosed at annex B of this Provisional Statement of Reasons). This error message does not constitute evidence that Essex Police fabricated evidence.

159. Issue eight: The submission that Nicholls has embroidered his account at various stages throughout the history of this case.

The applicants submit that a comparison of Mr Nicholls’ statements to the police, his evidence at trial, the TV documentary he helped to make, Mr Thompson’s book *Bloggs 19* and the statements taken from Mr Nicholls during the Commission’s section 19 investigation, provides ample evidence to attack the veracity of Mr Nicholls’ trial evidence. It is further submitted that, if these materials had been available at trial, they would have constituted vital sources of cross-examination.

160. The applicants state that a key example of Mr Nicholls’ willingness

to embroider his account can be found in his description of picking up Mr Steele and Mr Whomes from the scene of the murders. His police interviews, witness statements, and evidence to the trial jury, included the following description: “when the interior light came on, I noticed that Jack was wearing surgical-type gloves and that they were speckled with red”. The applicants invite the Commission to compare this to Mr Nicholls’ account to Tony Thompson, as related at page 139 of the book *Bloggs 19*, where the description reads:

“And that’s when I saw Jack’s hands. He was wearing surgical gloves. And they had been splashed with streaks of blood. And on the back of one hand was a lump of greyish slime surrounded by lumps of hair and skin and more blood”.

1. 1. It is submitted that the *Bloggs 19* description is an embellished version of Nicholls’ trial account. The applicants add that, even before Mr Nicholls’ witness statement of 20th August 1996, he gave an embellished account to the media. In the ‘joint proposal’ which was faxed from Tony Thompson to Caroline Dawney on 29th July 1996, Mr Nicholls is quoted as saying:

“Then I could see them for the first time, just for a second. They were both absolutely covered in bits of flesh and skin”.

162. It is submitted that Mr Nicholls’ accounts to the media, involving descriptions of “streaks of blood” and “bits of flesh and skin”, reveal the Commission to have erred in its conclusion (in its previous Statement of Reasons), where it stated that:

“there is no evidence or information to suggest that Mr Nicholls had been prepared to embroider his account in order to enhance the value of his story” [see paragraph 62 of Statement of Reasons in relation to Mr Steele, 15th December 2004].

163. In addition, the applicants submit that Mr Nicholls admitted to Tony Thompson that he had given perjured evidence at trial about Francis Read (it is noted that Mr Nicholls later denied this to the Commission’s section 19 enquiry). It is further submitted that Mr Nicholls gave contradictory accounts to the police (compared to his account in *Bloggs 19*) about why he became involved in crime with Mr Steele and Mr Whomes; and why he formed a relationship with DC Bird. The applicants argue that there is no sense, in Mr Nicholls’ account as relayed in *Bloggs 19*, that he was a reluctant or ‘duped’ participant in the criminal enterprises; nor is there any sense that he co-operated with DC Bird because he was desperate to stop Mr Steele and Mr Whomes from forcing him to commit crimes.

164. The Commission has considered all of these submissions, but takes the view that they relate to matters which were before the Court of Appeal in 2006. Both *Bloggs 19* and the ‘Joint Proposal’ were available to the applicants and to the Court of Appeal at that stage; and the Commission cannot see what is new on this point which

could form the basis of a second referral to the Court. In any event, whilst Mr Nicholls' accounts to the media do arguably reveal a willingness by Mr Nicholls to embellish his account - in the sense of making it more gory or sensationalist, or of including bravado about his relationships with Mr Steele, Mr Whomes and DC Bird - the descriptions to the media still do not reveal Mr Nicholls to have ever contradicted himself in the essential aspects of his account. Unlike in the case of *Austin*, there is no suggestion that Mr Nicholls was persuaded by the lure of financial gain to invent wholly false allegations against Mr Steele and Mr Whomes (which were not advanced at trial) when giving his account to the media. The Commission does not consider that this submission gives rise to a real possibility that the Court of Appeal would overturn these convictions.

165. Issue nine: The submission that Essex Police were complicit in Nicholls' meetings with the media.

The Commission takes the view that there is no new evidence on this issue which was not before the Court of Appeal in 2006. The applicants seek to rely upon an entry in Mr Nicholls' custody record which shows that Mr Nicholls was accompanied by DC Brown on 14th September 1996, which was the day that Mr Nicholls signed his first contract with the media. The Commission observes that the relevant sections of the custody record were disclosed part way through the applicants' trial, and the sections were also before the Court of Appeal in 2006. They do not constitute new evidence or argument for the Commission's purposes.

166. As part of their submission that Essex Police were complicit in Mr Nicholls' dealings with the media, the applicants claim that the conditions of Mr Nicholls' bail were varied in July or early August 1996 to enable him to travel to London to meet with media contacts. It is suggested that the bail variation involved the removal of the condition that Mr Nicholls "live and sleep at a police station designated by the Senior Investigating Officer". A photocopied page from the Rettendon Enquiry Police Policy file (book 4, page 15, dated 7th August 1996) is relied upon, which reveals part of an underlying bail notice. The applicants have suggested that this bail notice relates to Darren Nicholls. It is submitted that the police must have sought unconditional bail for Mr Nicholls in case he was seen on his own at any point during the trip to London on 1st August 1996. The secret grant of unconditional bail would have provided the police with an instant answer to any critics. It is further submitted that, if Mr Nicholls was on unconditional bail after 24th July 1996, this would make a

fiction of: his custody record, DC Brown's notebook, and the trial and appeal evidence of DCs Brown and Winstone.

167. In the course of its enquiries the Commission has located the bail notice which can be seen (in part) on the photocopied page from the Police Policy file. A redacted version of the notice was disclosed to the applicants on 9th August 2010. As the Commission confirmed at that stage, the bail notice does not relate to Darren Nicholls.

168. The Commission has discovered no evidence to support the applicants' allegation that the conditions of Mr Nicholls' bail were varied in July or August 1996. In any event, the Commission does not consider that a bail variation would be required in order for Mr Nicholls to attend a meeting in London. The SIO could have designated a police station in London for Mr Nicholls to reside at on the day in question. The Commission has considered the submission that unconditional bail might have been obtained in an effort to answer any potential critics who might have seen Mr Nicholls on his own in London, but in the absence of any evidence on the point, this submission remains pure speculation. In the Commission's view, it cannot give rise to a real possibility that the Court of Appeal would overturn the convictions in this case.

169. Issue ten: Reports have emerged in the national press, since trial in 1997, that Darren Nicholls has been involved in further criminality.

The Commission has carried out enquiries as a result of this submission and has discovered nothing which assists the applicants' case.

170. issue eleven: The allegation that certain officers of Essex Police have committed perjury in this case. Officers Brown, Winstone, Florence and Shakespeare are alleged to have given false evidence at trial and officers Brown and Winstone are alleged to have given false evidence on appeal. The applicants also renew submissions in relation to abuse of process.

In addition to submissions regarding DC Brown, DC Winstone and DI Florence, renewed submissions are also made in relation to DC Bird, DS Stimpson and DC Shakespeare, all of whom are alleged to have been discredited. Numerous allegations are also made in relation to former Detective Chief Superintendent Ralph Barrington.

171. The Commission has considered the numerous submissions which allege perjury, but takes the view that the matters raised constitute factual conflicts (which often arise in evidence at a trial or even on appeal) rather than actual evidence that any officer has lied on oath. The fact that one officer's recollection is contradicted by that of another is not evidence of perjury by either officer. Even evidence that an officer's recollection must be incorrect (e.g. a fax mark which shows that a diary must have been written earlier than the

officer claimed it was written) is not, *per se*, evidence that the officer lied on oath about the point. It is in this context that the Commission has considered the following submissions.

172. The applicants allege that DCs Brown and Winstone have given perjured evidence, both at trial in 1997 and before the Court of Appeal in 2006. It is submitted that their evidence has been contradicted by the evidence of other witnesses, such as the 'diving officers', and by important documents in the case, such as the police policy file. The Commission does not consider that the inconsistencies highlighted by the applicants constitute evidence that the officers have committed perjury or that any documents have been fabricated. In any event, the Commission notes that these were all points which were before the trial court and/or the Court of Appeal, and which fell to be examined at those stages.
173. The applicants submit that DC Bird, DS Stimpson and DC Shakespeare, have all been discredited, and that this undermines the integrity of the Rettendon enquiry. This submission is not new for the Commission's purposes. Allegations against DC Bird and DS Stimpson were explored in cross-examination at trial, and DC Shakespeare's conviction occurred before the 2006 appeal. In any event, the Commission observes that there is no evidence that any, of these officers had any contact with Mr Nicholls after his arrest on 13th May 1996.
174. The applicants make numerous submissions in relation to Ralph Barrington, who was the head of Essex Police CID at the time of the Rettendon murder enquiry. Between 1997 and 2011 Mr Barrington was employed by the Commission as an investigations advisor. The Commission makes the following observations in relation to individual submissions about Mr Barrington:
 - It is submitted that there has been a conflict of interest with Mr Barrington remaining in post at the Commission while the review has been carried out. The Commission recognised at an early stage in the first review of this case, that there would be a potential conflict of interest if Mr Barrington were to be involved in the case. Consequently, Mr Barrington has had no involvement in either Commission review. The applicants have been provided with assurances on this matter previously;
 - It is submitted that, as a senior officer in Essex Police with oversight of the Rettendon murder enquiry, Mr Barrington would have been aware of any "deception that was being employed in the name of Essex Police". The Commission has not discovered any evidence of deception employed in the name of Essex Police, by Mr Barrington or by any other officer;
 - It is submitted that Mr Barrington, when he spoke to Darren

Nicholls on 14th May 1996, advised him to change solicitor (the applicants rely upon pages 3 and 8 of the transcript of the second section 19 interview with Mr Nicholls, dated 11th May 2004). It is submitted that this was a breach of the rules of the PACE Act 1984 (the Commission is referred to the PACE “Notes for Guidance” at 6B and 6G of Code C). It is submitted that Mr Barrington's advice was what prompted Mr Nicholls to dispense with the services of his first solicitor, Mr Oddy. It is further submitted that Mr Barrington's advice meant that Mr Nicholls' account was unlawfully obtained and should never have been heard by the trial jury. The Commission notes that transcripts of Mr Nicholls' section 19 interviews were available for the applicants to utilise in their 2006 appeal. In any event, having considered the interviews in question, together with the section 19 statements of Mr Oddy and Mr Barrington, the Commission takes the view that there is no real possibility that the Court of Appeal would find Mr Barrington to have breached the rules of PACE when speaking to Mr Nicholls on 14th May 1996. Even if the Commission is wrong about this, it does not consider there to be a real possibility that such a breach of PACE would lead the Court of Appeal to find that Mr Nicholls' account should never have been heard by the trial jury. In this connection, the Commission notes that Mr Oddy, at page 3 of his section 19 witness statement (dated, 8th June 2004), stated that he ceased representing Darren Nicholls because he judged there to be a conflict of interest between representing Mr Nicholls and Colin Bridge at the same time. This recollection conflicts with Mr Nicholls' account that he dismissed Mr Oddy on the advice of Mr Barrington;

- Mr Steele alleges that shortcomings in the Commission's section 19 investigation were an attempt to protect Mr Barrington, who was, it is alleged, the “architect of operation Century”. Mr Steele has not provided any evidence in support of this submission, which is denied by the Commission. In relation to alleged ‘shortcomings’ in the section 19 enquiry, see paragraphs 177- 178 below.

175. The Commission has also considered the numerous submissions which allege that Essex Police officers have attempted to pervert the course of justice by falsifying documentary evidence. The submissions refer to documents such as DC Brown's handwritten witness statement, records of interview with Darren Nicholls, the police policy file, Mr Nicholls' custody record and DC Brown's diary. The Commission has found no evidence to suggest that any of these documents have been fabricated in any way. Nor is there any evidence that alterations have been made in an effort to wrongly implicate Messrs Steele, Whomes and Corry in the offences in

question. The submissions refer, in particular, to:

- Crossings-out, deletions and additions to the handwritten statement of DC Brown, dated 29th May 1996. Having considered this document, it appears to the Commission that DC Brown had initially omitted to refer to the interviews with Mr Nicholls which occurred on the evening of 14th May 1996, instead referring to the interviews on 15th May 1996 (interviews which related to Mr Nicholls' dealings with DC Bird). It appears that DC Brown, when he realised the omission, proceeded to overwrite the details of the interviews for 14th May 1996, in order to ensure that they were included in the statement. The Commission does not consider that this amounts to an attempt by Essex Police to fabricate a document in order to mislead the trial court. The Commission notes that the tapes and records of interview for 14th **and** 15th of May 1996 were disclosed at trial;
- Alleged inconsistencies and inadequacies in the records of Mr Nicholls' police interviews, for example, omitted signatures and incorrect interview tape reference numbers. It is submitted that these support the idea that the interviews with Mr Nicholls actually occurred at a later date than claimed by Essex Police and were then 'back dated'. The Commission does not consider that the aspects of the interview records which have been highlighted by the applicants support the submission that the interviews were back dated. For the Commission's overall view of the 'back dating' submission, see paragraphs 151-153 above. In short, the Commission has seen no evidence whatsoever to support this serious allegation;
- Alleged discrepancies in the police policy file. It is submitted that the file was "written up at a much later date than the dates shown on the document". The Commission has discovered no evidence that this is the case. The applicants have also suggested that there exists an additional police policy file which has never been disclosed to them. The Commission has not discovered any such additional policy file during its review;
- Alleged omissions in Mr Nicholls' custody record, police officers' notebooks and DC Brown's diary. It is pointed out that there are no references in those documents to Mr Nicholls' appearances at Chelmsford Magistrates' Court on 17th May 1996 and Southend Magistrates' Court on 24th July 1996, and no references to his movements on 1st August 1996 (the day he met with Tony Thompson and Caroline Dawnay in London). The Commission does not consider that any of these 'omissions' (which were before the Court of Appeal in 2006 in any event) suggest that Essex Police have deliberately fabricated any documents in this case. In so far as there are gaps in the records of Mr Nicholls'

handling by Essex Police in the summer of 1996, the Commission has discovered no evidence of any police impropriety on the dates in question;

- Alleged fabrication of police schedules of telephone calls (see paragraphs 109-129 above).

176. The applicants have renewed their submission that 'Operation Century' constituted an abuse of process by Essex Police and rendered the trial unfair. This submission does not constitute new evidence or argument for the Commission's purposes. Transcripts of the Operation Century telephone calls were disclosed to the defence at trial, and the subject was explored by defence counsel in cross-examination of former Detective Chief Superintendent Ralph Barrington (see pages 15-22 of the transcript of his evidence on 2nd October 1997, page 19 in particular); and former Detective Inspector Florence (see pages 11-16 of the transcript of his evidence on 28th October 1997). The applicants have also renewed their submission that DCs Brown and Winstone illicitly supplied Mr Nicholls with information about Operation Century, which Mr Nicholls then incorporated into his account of events. This is another issue which was explored at trial, forming part of the cross-examination of Mr Nicholls (see page 68 of the transcript of summing-up for 7th January 2010). The Commission has seen no evidence to suggest that DCs Brown and Winstone supplied Mr Nicholls with information about Operation Century.

177. Issue twelve: The Commission's section 19 investigation was defective.

The applicants have pointed out that further enquiries, carried out after the Commission referred this case to the Court of Appeal in December 2004, revealed that the Commission's section 19 investigation had not uncovered the true extent of Mr Nicholls' contact with the media in 1996. The Commission acknowledges that further evidence was uncovered on this issue (in particular from interviews with Barbara Boote and Caroline Dawnay) after the Commission referred the case. The Commission observes that the further evidence was considered by the Court of Appeal in 2006.

178. The Commission has considered the applicants' criticisms of the section 19 investigation, but takes the view that it is not part of the Commission's function in the current review to assess past errors and/or omissions, unless they point towards avenues of investigation which remain relevant to the safety of the applicants' convictions. It is in that context that the following submissions have been considered:

- It is submitted that the Commission's section 19 investigation made inadequate enquiries in relation to Mr Nicholls' contact with

the media. The applicants urge the Commission to locate any expense claims which were processed by Essex Police in relation to Mr Nicholls' trip to London on 1st August 1996. The Commission has now made enquiries on this point but has been informed by Essex Police (on 17th January 2008) that there are no records still in existence in relation to car usage, expense or overtime claims for the desired period of time; these documents have been destroyed in accordance with normal file retention policies. In any event, in view of the Court of Appeal's observations at paragraphs 35-38 of its 2006 judgment, the Commission does not consider that expense claims showing that Essex Police officers accompanied Mr Nicholls to London on 1st August 1996 would be capable of giving rise to a real possibility that the Court of Appeal would overturn the convictions in this case;

- It is submitted that the Commission's section 19 investigation carried out inadequate enquiries into the police officers who accompanied Mr Nicholls on excursions from police stations in the summer of 1996. In particular, it appears that no enquiries were made into "Force Support Unit" (FSU) firearms officers. The applicants urge the Commission to locate and interview one former FSU officer, PC Philip Truss, who is said to have provided Mr Nicholls with an armed guard at various times in the case. PC Truss is said to have "deep concerns" about the case, which are connected in some way to a "police surveillance videotape of the three men who were shot". It is submitted that PC Truss may be able to provide the Commission with important information regarding whether the victims were under police surveillance on the 6th December 1995. The Commission notes that the applicants' information in relation to PC Truss derives from a report in the East Anglian Daily Times (13th November 2008) regarding the trial of Michaela Britton for perverting the course of justice. The Commission has not been provided with a copy of the report in question; nor has the Commission been provided with any further details of what information PC Truss might have in relation to the applicants' case. The Commission also notes that the claims regarding surveillance tapes apparently originate from Ms Britton, who was eventually convicted of perverting the course of justice after a trial in which she was described as a "fantasist" who "made up a string of serious allegations". In the circumstances, the Commission considers that there is no proper basis for locating and interviewing PC Truss. In any event, as has been explained at paragraph 74 above, in the course of this review the Commission has discovered no evidence that the victims were under surveillance on 6th December 1995.

179. Issue thirteen: Numerous criticisms are made of the way the Court of Appeal handled the case when it reconsidered it in February 2006.

The Commission is not empowered to overturn a decision by the Court of Appeal. There is no right of appeal against the Court's assessment of the facts of a case, the only right of appeal is to the House of Lords on a point of law. The Commission is only empowered to consider whether there is a real possibility that the Court of Appeal would overturn a conviction if the case were referred again now. Such a real possibility must be based on new evidence or argument was not raised at trial or on a previous appeal. The Commission has considered all of the applicants' submissions in the light of these principles.

180. Issue fourteen: Submissions which rely upon legal authorities.

In the course of their submissions, the applicants have sought to rely upon the cases of *R v Turner* (1975) Cr App R 67, *R v Grant* [2005] CWCA Crim 1089 and *R v Davis* [2008] UKHL 36. The Commission has considered each of these authorities in the context of the applicants' case and paying particular attention to their various submissions. The Commission takes the view that none of the authorities or the associated submissions gives rise to a real possibility that the Court of Appeal would overturn the convictions in this case.

181. The applicants seek to rely upon the case of *R v Turner*, in which the court held that the police should not obtain evidence against a defendant from a co-defendant until that co-defendant has admitted and pleaded guilty to his part in the offence. It is submitted that the police failed to do this with Mr Nicholls, as he pleaded guilty on 16th August 1996 (and signed the Essex Police protected witness contract on 23rd August 1996), but statements had been taken from him from 21st May 1996. It is submitted that Essex Police failed to follow the correct legal practice on this issue; and that Mr Nicholls had therefore not given any proper, admissible statement before his contact with the media in late July 1996. The Commission has considered this submission but observes that Mr Nicholls was never a co-defendant in relation to the murder counts, so he was free to give a statement from the moment he was de-arrested on 21st May 1996. In relation to the drugs offences, Mr Nicholls did not give a statement until 20th August 1996, after pleading guilty on 16th August 1996 to his own involvement in those offences.

182. The Commission has considered the case of *R v Grant*, and notes that it concerned covert audio surveillance by the police which was intended to capture legally privileged conversations between the suspect and his legal advisor. The Commission does not consider that *R v Grant* has any relevance to the applicants' case.

183. The applicants also seek to rely upon the House of Lords decision in *R v Davis*, a case which relates to the evidence of anonymous witnesses. The applicants point out that Donna Jagers gave her

evidence at trial under the pseudonym Diana Evans and was allowed to give evidence out of sight of the defendants. The Commission has considered this submission, in conjunction with the case of *R v Davis* and subsequent relevant legislation, namely, the Criminal Evidence (Witness Anonymity) Act 2008 and the Coroners and Justice Act 2009.

184. The Commission observes that, unlike in the case of *R v Davis*, the convictions in this case were not based “solely or to a decisive extent” upon the testimony of Donna Jagers. In any event, the Commission notes that the true identity of the witness “Diana Evans” would have been known to the applicants at trial, by virtue of her evidence that she was Craig Rolfe’s common law wife. The applicants have not suggested any additional checks or investigations into this witness which would have become possible if her real name had been used during the trial proceedings. The Commission has not identified, during its own review of this case, any relevant additional investigations into Donna Jagers which should be pursued now. The Commission notes Ms Jagers’ evidence was properly tested, and that defence counsel were able to carry out effective and thorough cross-examination at trial (summarised at pages 72-78 of the transcript of summing-up for 8th January 1998). It does not appear that cross-examination was in any way hampered by Ms Jagers’ pseudonym or the fact that she gave evidence out of sight of the applicants. In all of the circumstances, the Commission does not consider that the applicants’ submission regarding Donna Jagers and the case of *R v Davis* gives rise to a real possibility that the Court of Appeal would overturn the convictions.
185. A further point which has been made by the applicants in relation to the *R v Davis* submission, is that Darren Nicholls was hidden from view by a curtain when he gave evidence at the committal proceedings in this case. The Commission observes that Mr Nicholls did not give anonymous evidence at the trial in 1997. There was no sense in which the applicants were prevented from confronting the main prosecution witness against them. This submission regarding Mr Nicholls does not give rise to a real possibility that the Court of Appeal would overturn the convictions.
186. Issue fifteen: It is submitted that Donna Jagers’ witness statement (14/03/1996) contradicts her account as reported by DI Florence in his report R4 (08/12/95) and the police message M93 (also dated 08/12/1995).

The Commission has considered Ms Jagers’ witness statement (S142A, dated 14th March 1996), report R4 by ex DI Florence and police message M93. The Commission notes that the CPS disclosed report R4 (in slightly redacted form) to the applicants before their trial (on 11th April 1997; it was forwarded to defence counsel on 23rd

April 1997). It follows that report R4 was also available to be utilised in the applicants' appeal hearings in 1999 and 2006. In any event, the Commission does not consider Ms Jagers' account as described in report R4 to be inconsistent with her trial evidence. Nor do the details contained in police report R4 give rise to a real possibility that the Court of Appeal would overturn the convictions if the case were referred now.

187. The Commission notes that message M93 refers to Ms Jagers last seeing Mr Rolfe on the *morning* of the 6th December 1995, rather than at around 5:45 on the *evening* of the 6th December 1995, as she stated in her trial evidence. The applicants have not informed the Commission when message M93 was disclosed to them, but the Commission recognises that it could have been used in cross-examination of Ms Jagers at trial if it had been available to the defence at that stage.

188. The Commission has considered the apparent inconsistency between the times referred to in message M93 and Ms Jagers' trial evidence. The Commission takes the view, however, in the context of the rest of Ms Jagers' evidence, that any such inconsistency does not give rise to a real possibility that the Court of Appeal would find Ms Jagers' to have been unreliable in her account. In the context of the rest of the evidence in this case, the Commission does not consider that message M93 is capable of giving rise to a real possibility that the Court of Appeal would overturn the convictions if the case were referred now.

189. Issue sixteen: Mr Steele submits that on 6th December 1995, since it was "rush hour on a snow driven night", Mr Tate could not have travelled from the Halfway House pub at 18:30 (where Nicholls claims to have seen him) to Workhouse Lane at 18:44 (where he is alleged to have been when he received a call from Sarah Saunders). It is also submitted that Tate could not have travelled from his home address to the Halfway House pub in the 24 minutes between the last call to Claire Carey and Nicholls' alleged sighting of Tate at 18:30.

The Commission has considered these submissions, but considers that they are points which fell to be explored at trial. The applicants were well aware of the nature of the Crown's case in relation to timings and the movements of the relevant parties.

190. Issue seventeen: Raymond Wright, a witness who gave evidence at trial described a Range Rover turning into Workhouse Lane at approximately 19:00 on 6th December 1995. The description of this vehicle did not match that of the Range Rover that the three deceased were discovered in on 7th December 1995.

As the applicants acknowledge, Mr Wright gave evidence at trial. His evidence was also relied upon at page 30 of Mr Steele's grounds

of appeal of 22nd June 1998. Mr Wright's account does not constitute new evidence or argument for the Commission's purposes. The argument that the Range Rover which was witnessed by Mr Wright was not that of the victims was explored in cross-examination at trial (in relation to the applicants' submissions regarding alternative suspects, see paragraphs 194 and 195 below).

191. Issue eighteen: The cannabis which was alleged to have been found in the Rigid Inflatable Boat (RIB).

It is submitted that police message M622, which formed part of the unused material at trial, contradicts the Crown's version of events (as presented at trial by witnesses Daphne Lidstone and John Wilier) in relation to how traces of cannabis were found in the Rigid Inflatable Boat (RIB).

192. The Commission acknowledges that the version of events contained in this message is factually inconsistent with the Crown's case at trial, in that it was never contended that cannabis was discovered in the RIB on the 8th November 1995, nor was it contended that the drugs were discovered by a sniffer dog. Message M622 could, therefore, have been used in cross-examination of the Crown's witnesses in relation to this issue. However, in the context of the case as a whole, the Commission does not consider that this message (which was available at trial in any event) gives rise to a real possibility that the convictions would be overturned by the Court of Appeal if the case were referred now. Although there is an arguable inconsistency, it does not show that the Crown's trial version of how the cannabis was discovered must be false, or that state agents were responsible for 'planting' the cannabis in the RIB.

193. In support of their allegation that officers of HM Customs and Excise 'planted' the cannabis which was found in the RIB on 10th November 1995, the applicants point out that the amount said to have been discovered was similar in quantity to that seized from the home of Gordon Stevens from his beach property (known as 'Feronia') on 8th November 1995. The applicants also rely upon the fact that no drugs were found when the RIB was subjected to a rigorous search on 8th

November 1995. The Commission has considered the submission that the drugs were planted by Customs and Excise, but notes that there remains no evidence that this actually occurred. This submission is an unsubstantiated allegation which, in the absence of any evidence, cannot form the basis of a referral to the Court of Appeal.

194. Issue nineteen: Request for further disclosure in relation to possible alternative suspects.

The applicants submit that police intelligence from 1995 and 1996 suggested that Paul Edwards, Ray Sullivan and Michael Bowman

were involved in a 'plot' to kill Tate, Tucker and Rolfe. The applicants point out that Paul Edwards drove a Range Rover in December 1995 (it is suggested that this may be the vehicle which was seen entering Workhouse Lane by Raymond Wright) and that shortly before the murders he had 'fallen out with' Mr Tucker. The applicants request disclosure of any new information that the Commission has obtained in that regard.

195. The Commission has considered this submission and request, but can confirm that no new information has been discovered in relation to Edwards, Sullivan or Bowman (or of a plot to kill Tate, Tucker and Rolfe by any alternative suspects) which has not previously been disclosed to the applicants.

Further Submissions

196. On 11 October 2010, Mr Whomes was informed that the Commission had reached a provisional view that there was no real possibility that his conviction would be overturned if it was referred to the Court of Appeal. Mr Whomes was offered the opportunity to make further submissions in response by 8 December 2010. This date was extended by agreement with Mr Bowen.

197. The Commission received the following further submissions from, and on behalf of, the applicants:

- A covering letter and enclosed report, entitled "Aspects of Telephone Evidence", were received from Mr Bristowe on 26th January 2011 ;
- Submissions from Mr Steele, contained in a folder entitled "Further Submission Re- The Provisional Statement 11.10.2010". This was accompanied by a second folder containing various documents in support of Mr Steele's submissions, entitled "Exhibits A". All items received on 27th January 2011;
- Further submissions from Mr Whomes, entitled "Cover letter re PSOR Response", were received on 31st January 2011;
- A CD-Rom prepared by Mr Whomes was received on 31st January 2011. It included three documents entitled:
 1. Nicholls' & Tate's Cell Site Data;
 2. Nicholls' Embroidery;
 3. Ignored Divert to Recall Data Schedule.

- Submissions from Mr Bowen, legal representative for Messrs Steele and Whomes, received by email on 7th February 2011 and entitled “Further Representations on behalf of the Applicants in Response to the Provisional Statement of Reasons”;
- A letter, dated 7th April 2011, comprising additional submissions from Mr Whomes entitled ‘Further Support re-lost s.78 Application’;
- Submissions from Mr Bowen received by email on 20th July 2011 and entitled “Further Representations on Behalf of the Applicants Following the Provisional Statement of Reasons”.

Further Analysis and Reasons

Overview

198. This is the Commission’s second review of these convictions; the first review concluded with a referral to the Court of Appeal. The convictions were upheld at the resulting appeal. The Commission has already observed that submissions covering in excess of 600 pages were made before the Commission reached a provisional decision not to refer this matter to the Court of Appeal. A significant proportion of the points which were then raised by or on behalf of the applicants did not amount to new evidence or argument. Where submissions were made which were arguably new, those submissions did not have sufficient cogency to give rise to a real possibility that the Court of Appeal might quash these convictions.
199. In their further submissions the applicants have sought to challenge the majority of the provisional conclusions reached by the Commission.
200. The Commission has carefully considered all of the submissions which have been made in this case and has reviewed the conclusions set out above in light of the further representations which have been made. However, where the further submissions amount merely to a restatement of matters already considered in respect of which the Commission’s view remains unaltered, the Commission has not repeated those submissions in the analysis appearing below. Rather, the Commission has limited its written analysis to those issues in respect of which ostensibly new arguments have been raised, albeit the majority of those arguments concern facets of broader issues which have already been considered.

Telephone evidence - overview

201. The applicants have made substantial and detailed further representations about the use of telephone evidence, both billing data and cell-site analysis, in this case. The applicants disagree with the Commission's analysis of the issues surrounding this evidence and contend that the Commission has wrongly ignored evidence or interpretations of the available evidence which might be consistent with the contention that the telephone evidence was falsified. Alternatively, the applicants argue that the Commission should go to greater lengths to discover evidence to support such a proposition.
202. In essence, the primary focus of the submissions made in respect of the telephone evidence is the applicants' contention that that evidence should be regarded with suspicion. The corollary of that contention is that any irregularity or inconsistency in the available material ought properly to be regarded as supporting the proposition that the telephone evidence was manipulated or invented by Essex Police in order to bolster the prosecution case.
203. The Commission referred, at paragraphs 128 and 129, above, to the observation of the Court of Appeal that it was not surprising that human error had occurred in the compilation of the telephone data schedules. The Commission remains of the same view given the volume and complexity of the telephone data in this case and the fact that this was one of the first prosecutions in which telephone data evidence had been used.
204. Fundamentally, the purpose of the telephone evidence adduced at the trial was to demonstrate that there came a time after which the deceased men stopped making or receiving telephone calls and to show that the applicants were in the relevant area at the relevant time. It follows that, in assessing the further submissions, the Commission has been concerned to establish whether there exists any fresh evidence or new argument capable of giving rise to a real possibility that the Court of Appeal might now conclude:
- That the telephone evidence was so inaccurate or unreliable that it should not have been relied on at all; or
 - That Essex Police deliberately manipulated the telephone data made available for the purposes of the trial in order to establish a false time of death; or
 - That the telephone data in fact supports either the assertion that the deceased made or received calls after 18:44 on 6th December 1995 or the evidence the applicants gave as to their whereabouts at the material times.

Issue 1; Telephone evidence data - inaccuracy

205. The applicants refer to the record of a call between the mobile telephone ending in 923 (Tate 923) and a mobile telephone belonging to a Mr Edwards ending in 361 (Edwards 361), at 1454 on 6th December 1995. The call lasted 51 seconds but the data is said to show Mr Edwards' handset having switched between cell-site beacons over 230 miles apart during the call. It is argued that this must be an error in the data and that this clear error casts doubt on the accuracy/reliability of the telephone evidence as a whole. It is further argued that the existence of this error casts doubt on the integrity/reliability of Mr Yeadell, the employee of Orange Plc who produced the relevant data at trial.
206. In addition, the applicants observe that the telephone billing evidence contains a number of seemingly impossible calls, specifically calls to Mr Tucker's former landline telephone number after the date (approximately a week before the murder) when his telephone number changed. It is argued that these are either further errors or evidence of deliberate manipulation.
207. The Commission notes that the fact that there were errors in the schedules of telephone calls was raised at the applicants' renewed application for leave to appeal, in 1999. The Court refused leave to appeal on this ground in the following terms:
- "In ground 8 it is argued that the judge wrongfully admitted evidence which was inaccurate in detail and used to corroborate false claims by the prosecution. This relates in the main to schedules of telephone calls which were laid before the jury. It may very well be that there were errors in such schedules; it would indeed be surprising if there were not. It does not however appear, in particular so far as the telephone calls on the day of the alleged murders are concerned, that there were errors which in any way put a false gloss on the case."
208. In the circumstances, the basic contention that there were errors in the schedules is not new and could not form the basis of a referral to the Court of Appeal. The Commission notes that, as previously recognised by the Court of Appeal, the analysis and collection of beacon data was, at the time of the trial, a new and uncertain technology. It is in those circumstances unsurprising that mistakes in the data and/or anomalous readings can now be identified.
209. The jury were warned at trial of potential problems with beacon data, both in the evidence of prosecution and defence experts as well as the trial Judge's summing-up. In particular, the Commission notes that the transcript of the summing-up for 12th January 1998 includes the following quote from the evidence of Simon Collins: "30 million calls are stored every day. It normally will provide the

information but every system makes errors’³. The trial judge also quoted Mr Bristowe’s evidence, reminding the jury that, in the interpretation of mobile phone coverage data, there were “many opportunities for errors to give misleading results’⁴. Having regard to this, and to the Court of Appeal’s comments when considering the telephone evidence, the Commission takes the view that there is no real possibility that the Court of Appeal might now conclude that any ground of appeal arises from the identification of this specific error in the beacon data (whether or not the particular error was drawn previously to the attention of the Court). The Commission takes the view that the specific error identified by the applicants is not capable of putting a ‘false gloss’ on the prosecution case.

210. So far as the calls to Mr Tucker’s landline telephone number are concerned, the Commission takes the view that this is a point which does not assist the applicants or give rise to a ground of appeal. The Commission observes that there are a number of perfectly plausible explanations other than that these entries were fabricated, such as the possibility that his previous number had been reassigned or that calls were forwarded from the old to the new number. Certainly, the Commission cannot see how altering records to show that, some time before the murders, persons might have called a number which had previously belonged to Mr Tucker might have been thought to assist the prosecution case.
211. The Commission repeats that it has discovered no evidence that any of the telephone evidence was fabricated or manipulated. It follows that this matter cannot form the basis of a reference to the Court of Appeal.

Issue 2: Telephone data - Earlier versions and falsification

³ Summing up 12/01/1998 I4C

⁴ Summing up 12/01/1998 50D

212. Detailed and comprehensive submissions have been made by the applicants, by Mr Bristowe and by Mr Bowen with a view to demonstrating that Essex Police must have possessed versions of the telephone data reports which pre-dated those produced in evidence at the trial. It is argued that these earlier versions might have included evidence that the deceased men answered calls after the supposed time of the murders. It is contended that new versions were produced to disguise this fact and thereby mislead the jury.
213. Put simply, by reference to various documents and to schedules which they have compiled, the applicants and their representatives argue that it can be inferred that information about telephone usage was known to Essex Police before that information would otherwise appear to have been made available by the relevant providers. In

addition, it is argued that it should be inferred that telephone billing information has been tampered with by or on behalf of Essex Police. The Commission has already considered this issue generally (at paragraphs 86-93, above). The Commission observes that the submissions which have been made in this connection amount to speculation as to how Essex Police might, had they so wished, have gone about disguising or concealing evidence which was unfavourable to the prosecution case. Crucially, the Commission observes that there remains no evidence that Essex Police sought to conceal any evidence in this, or any other, respect and there remains no evidence to suggest that the mobile telephones attributed to the deceased men made or received telephone calls after the last recorded call at 18:44 on 6th December 1995. Further, and in any event, the Commission observes that all of the documents on which the applicants have relied to construct their hypothesis were available and disclosed at least before their appeal, if not by the time of their trial.

214. At paragraph 88, above, the Commission set out the response provided by Essex Police to questions raised by the Commission as to the way in which telephone data had been provided to the investigation. The Commission regarded as reasonable the explanation given that data would at that time have been provided initially as a result of an informal request. The Commission notes, in this connection, that a request was made to a Fiona Walker at Vodafone, on 22nd December 1995, to "supply beacons used on 6th December 1995 in relation to mobile phones 0831 244657 - 03853173275 [illegible] 0385392473"⁶. It is apparent that where such an informal request was made, a formal request would subsequently be made where the evidence needed to be presented in an

⁵ Mr Tucker's mobile telephone

⁶ Reproduced at page 36 of the materials sent to the Commission by Mr Steele 'Exhibits A'. See also paragraph 218 of this Statement of Reasons.

admissible form. The result of a formal request of that type would have been a statement exhibiting information which was then already known to the Police, such as those prepared by David Yeadell, DY/1 & DY/2.

215. It is clear, therefore, that Essex Police were in possession of telephone data before any formal requests for that data were made. However, the Commission has seen no evidence either that Essex Police sought to disguise the fact that data had been provided prior to a formal request or that the data initially provided was not the same as that which was provided pursuant to the subsequent formal request. It follows that there is no basis on which this issue might

form the basis of a referral to the Court of Appeal.

Issue 3: Telephone data - time restrictions

216. The applicants repeat their assertion that when Essex Police requested telephone data from Orange Plc, relating to the mobile telephone Tate 923, they deliberately limited the request to within certain time parameters, which were intended to bolster the prosecution case. The applicants claim that they were therefore prevented from demonstrating, at trial, that Mr Tate had used his telephone after the alleged time of his death. The Commission has addressed this issue at paragraphs 88-93 of its Provisional Statement of Reasons.

217. The Commission recognises that, during its review of the police files, it was unable to locate an initial application for cell-site data relating to Tate 923. However, the Commission has already set out why, in the circumstances of this case, this lack of documentation does not, in its view, suggest bad faith on the part of the police and/or prosecution (paragraphs 88-93, above).

218. The applicants rely on Mr Bristowe's report, dated 25th January 2011, in which he dismisses the idea that a request for cell site data could be made informally (see paragraph 88, above) and asserts that access to the data would have required "authorisation at a very senior level", including a Court Production Order. The Commission remains of the view that notwithstanding the fact that such a practice would not subsequently have been permissible, and recognising that the practice was perhaps not best practice at the material time, it is nonetheless clear that telephone data was initially provided to the investigation as a result of informal enquiries made of the telephone service providers. It is reasonable to conclude on the available evidence that subsequent formal requests, such as the one made of David Yeadell, were for the purpose of preparing evidential material for trial. In particular, the Commission refers to the request for beacon data addressed to Fiona Walker at Vodafone and dated 22nd

December 1995. This was accompanied by a fax cover letter, which referred to "As per our telephone conversation on Thursday".

219. The Commission notes Mr Steele's linked submission that co-operating with informal requests for beacon data would not have been in accordance with Orange company policy. In that connection the Commission observes, first, that the policy to which Mr Steele refers is dated 3rd April 1996, some months after the initial beacon data would have been collected. Furthermore, the fact that Essex Police were clearly in possession of beacon data before a formal request had been made would tend to suggest that, whether or not the policy was in force when data was provided, the policy was not

universally applied. In any event, the Commission takes the view that the existence of the policy is not evidence that the telephone evidence had been fabricated or that data was manipulated. The Commission has already noted that the procedure adopted during this investigation was not in accordance with the standards of today but observes that this was known to the Court of Appeal on both occasions when that Court considered this case. For the avoidance of doubt, the Commission remains of the view that this fact does not, of itself, give rise to arguable grounds for a referral to the Court of Appeal.

220. In continued reliance on Mr Bristowe's report, the applicants maintain that there is a sinister explanation for the absence now of relevant documentation, arguing that this is consistent with a conspiracy to secure and maintain their convictions. The Commission has not found any evidence to substantiate the applicants' suggestion that Essex Police have deliberately disposed of or concealed any material relating to telephone data. As part of its review of this issue, the Commission sought the views of Essex Police in respect of the absence of certain documentation, as set out at paragraph 88 above. Nothing in the various submissions made by or on behalf of the applicants causes the Commission to doubt the veracity of the response received from Essex Police. Certainly, the Commission is entirely satisfied that there is no evidence that any attempt has been made to conceal any material.

221. Notwithstanding their criticism of his statement elsewhere in their representations, the applicants and their representatives repeat their reliance on the statement of David Yeadell as evidence that time restrictions were placed upon the telephone data. The Commission addressed this submission at paragraph 91, above. Having considered the further submissions, the Commission sees no reason to depart from the conclusion set out at that paragraph.

Issue 4: Telephone data - false inferences

222. The applicants argue, supported by Mr Bristowe, that the fact Mr Tucker did not answer calls after 19.09 on 6th December 1995 should not have been used as an indication that he was, by then, dead. In particular, Mr Steele asserts that Mr Tucker would often allow calls from his partner, Miss Whitehead, or his mistress, Miss Garwood, to be diverted to voicemail. Mr Steele reasons that this was because Mr Tucker wished to avoid awkward situations. In the alternative, it is suggested that the Vodafone Messaging Service did not alert Mr Tucker's handset that there had been a missed call at 19.09. It is contended that these possibilities offer a more rational explanation for Mr Tucker's failure to respond to the call than the proposition relied on by the prosecution. The Commission has also

received a spreadsheet document, prepared by Mr Whomes, which purports to demonstrate the likelihood of such an explanation.

223. Mr Bristowe has sought to correct the assertion in the Commission's provisional Statement of Reasons that, in the period between the alleged time of death and when the victims were discovered, Mr Tucker's voicemail recorded 26 unanswered messages. The Commission has reviewed the voicemail records and the relevant paragraph⁷ in the Statement of Reasons and acknowledges that the 26 voicemails left on Mr Tucker's telephone covered a period from before the alleged time of death to the following day. The clarification of this information does not impact upon the Commission's original analysis; voicemail messages were left for Mr Tucker which he could, had he been alive, have answered. He did not do so, and the jury were entitled to draw the conclusion that this was because he was dead.
224. The Commission observes that the fact that there were alternative explanations for Mr Tucker's failure to answer his telephone would have been quite apparent to the jury. There is no fresh evidence to support the applicants' alternative theory and nothing to suggest that Mr Tucker was in fact still alive at the time the voicemails were left. The fact that an alternative explanation might be offered for this aspect of the evidence does not alter the fact that the unanswered calls were consistent with the prosecution case. In the final analysis, the Commission takes the view that there is no reason to depart from its previous analysis of these issues, at paragraph 142 above.

Issue 5: Telephone data - the 21:41 call from mobile 316

225. The applicants repeat their assertion that DC White tampered with the telephone schedule and attempted to conceal both the fact that the mobile phone ending 316 was initially thought by the police to belong to Mr Tate and the fact that a call was made from that

⁷ Paragraph 87

telephone at 2141 hours on 6th December 1995. The applicants maintain that they were prejudiced by the withholding of this information and argue that the most plausible explanation for this call is that the phone was in Mr Tate's possession and he was contacting Miss Fletcher, after the supposed time of death, in order to make arrangements for her to collect him because he was unfit to drive, perhaps because he was drunk.

226. The Commission has already considered the contention that this call ought properly to have been included in the schedules exhibited at trial. The Commission noted (paragraph 116, above) that there was

compelling evidence that this telephone was in Miss Fletcher's possession at the material time and concluded that there was no proper basis on which to criticise the decision not to include the call on the schedule. The Commission noted also that the fact that such a call was made was within the material disclosed to the defence before the trial.

227. The argument now raised by the applicants as to the circumstances in which that call might have been made, whilst convenient to the defence case, is pure speculation and is unsupported by any evidence. In the circumstances, the Commission sees no reason to depart from the analysis of this issue set out in paragraphs 114-117 above.

Issue 6: telephone data - further evidence

228. The Commission is asked to confirm the steps it took to obtain itemised telephone billing data in respect of the telephone numbers recovered from the mobile telephones attributed to Mr Tucker and Mr Tate. It is argued that the information recorded in the billing data would have been of such use to the investigating officers that it is inconceivable that this information would not have been obtained during the original investigation.
229. The Commission made relevant enquiries of the HOLMES database system and made further specific enquiries of Essex Police. In the circumstances, the Commission can see no good reason to doubt the responses received from Essex Police and can see no basis on which to conclude that taking statements from various officers involved in the investigation (as suggested by the applicants) might result in billing data or other relevant information coming to light. So far as the telephone providers are concerned, the Commission remains of the view that the passage of time would render futile any attempt to obtain billing data now.

Issue 7: telephone data - expert evidence

230. The Commission has received a further report from Mr Bristowe with regards to telephone data and cell-site analysis. In considering whether this report raises new issues or offers new information on points previously raised, the Commission has had regard to Mr Bristowe's previous submissions and the Commission's analysis of the issues he then raised, particularly at paragraph 101, above.
231. Mr Bristowe continues to assert that the testing he conducted, designed to assess the connectivity and geographical coverage of cell beacons in the relevant area, provides substantive support for the applicants' alibi. His reports are complemented by the applicants' submissions regarding the physical geography of the area and the potential coverage difficulties in respect of the mobile

phones of Messrs Steele, Whomes and Nicholls. The Commission observes, however, that although Mr Bristowe disagrees with the conclusions reached by the Commission and remains of the view both that the evidence adduced in this connection by the prosecution at the trial was misleading and that his interpretation should be preferred, his report provide no new evidence or new analysis of the relevant issues. In short, the matters raised are the same issues as have been previously considered, both by the Court of Appeal and by the Commission.

232. As the Commission has identified, it was clear at the applicants' trial that cell-site analysis technology was then in its infancy and many of the results obtained and interpretations given were challenged. Mr Bristowe gave evidence at the trial and his evidence was again considered at appeal. The Commission has considered Mr Bristowe's submissions at every stage of this review. In the final analysis, whilst recognising the strength of Mr Bristowe's opinion in respect of this case, the Commission remains of the view that the evidence which he might provide is substantially the same as that he gave at the trial and which has already been considered by the Court of Appeal. In the circumstances, that evidence is not new and could not form the basis of a referral by the Commission. Further, in the circumstances there is no real possibility that the Court of Appeal might now conclude that such evidence might afford a ground on which an appeal might be allowed.
233. The applicants insist that the evidence and submissions of Mr Ross Patel support a referral to the Court of Appeal. The Commission has addressed the submissions made by Mr Patel at paragraphs 127-128, above. Despite Mr Steele's assertion that he would do so, Mr Patel has not made any further representations in response to the Provisional Statement of Reasons or at all. Accordingly, the Commission sees no good reason to depart from its previous analysis of Mr Patel's evidence.

Issue 8: telephone data ~ legal argument

234. The applicants argue that the telephone evidence adduced at their trial was obtained fraudulently and in breach of PACE. They do not, however, identify the aspect of the Police and Criminal Evidence Act and/or the accompanying Code of Practice which was, in their submission, breached. In any event, the Commission observes that this issue was raised in the context of the Commission's first review of the case, when it was argued that counsel had ignored explicit instructions to challenge the telephone evidence at trial. In the Commission's response to that submission it was noted that the Court of Appeal had already concluded that the telephone schedules did not, of themselves, affect the safety of the conviction. The Commission has not received or discovered anything that

undermines this conclusion.

235. The Commission considers the allegation that the telephone schedules were obtained fraudulently to be a development or variation of the broader submissions in respect of the telephone evidence which are set out elsewhere in this Statement of Reasons. The assertion that the telephone evidence was essentially a work of fiction created by Essex Police, ratified by corrupt employees of Orange PLC, is not one in which the Commission finds any substance. The Commission has considered this contention at paragraphs 86-93 above and remains of the view that there is no evidence to support the applicants' arguments concerning data manipulation or fraud. Accordingly, the Commission takes the view that this is a ground with no real possibility of success.
236. It is further argued that the Regulation of Investigatory Powers Act 2000 ("RIPA") should operate retrospectively, with the result that the way in which telephone data was obtained by Essex Police during the original murder investigation could now be challenged. It is submitted that, because the Commission cannot find any signed document requesting the data, relevant authorisation was not given. Whatever merit these submissions might otherwise have had, the Commission observes that RIPA does not have retrospective effect and this submission is, therefore, simply misconceived.

Issue 9: Barry Dorman's telephone call to phone 923

237. The applicants argue that Mr Dorman's statement, that he called Mr Tate's 923 mobile telephone on the morning of 7th December 1995, when it was answered by a woman (paragraph 90, above), requires further investigation. Specifically, it is said that enquiries should be made as to whether other calls were received by this phone.
238. The Commission has considered Mr Dorman's statement again in light of the applicants' further representations and takes the view that the information set out in that statement is not capable of supporting a ground of appeal with any real possibility of success. First, the statement was disclosed to the defence at trial and available at appeal. Secondly, the Commission observes that Mr Dorman, on his own account, made the telephone call to phone 923 at a time when the crime scene was being investigated by the police. In those circumstances, the Commission takes the view that it is wholly improbable that this telephone was answered at all, and certainly not by a female who indicated that Mr Tate was out 'on a job'. Indeed, the Commission observes that it is perhaps more realistic to suppose that Mr Dorman received no response to his call to phone 923 and made a subsequent call to mobile phone 316 which was answered by Ms Fletcher.

239. In any event, whatever uncertainties might surround his statement, the Commission notes that Mr Dorman's account does nothing to assist with the time of death; the victims' bodies had already been discovered long before Mr Dorman made his telephone calls.

Telephone Evidence: Conclusion

240. The majority of the applicants' submissions constitute attacks on the telephone evidence used against them at trial. The Commission notes that this has been a recurring theme throughout the review and appeal process. After careful consideration, the Commission takes the view that the further submissions largely rehearse arguments previously raised at trial, on appeal or during the review process. Where the applicants have relied upon a new criticism of the data or sought to provide a speculative explanation for data which does or does not exist, the Commission has taken the view that such arguments, being entirely without evidential support, cannot give rise to a ground of appeal which might persuade the Court of Appeal that the applicants' convictions are unsafe. Accordingly, none of the matters raised by the applicants in relation to telephone data is capable of giving rise to arguable grounds for a reference in this case to the Court of Appeal.

241. The Commission repeats that the purpose of the telephone evidence adduced at the trial was to demonstrate that there came a time after which the deceased men stopped making or receiving telephone calls and to show that the applicants were in the relevant area at approximately the relevant time. None of the submissions which have been made by the applicants casts significant doubt on either of these propositions or lends significant weight to the proposition that the telephone evidence presented at the trial had been fabricated or manipulated.

242. For the avoidance of doubt, having considered all of the evidence in the case and all of the arguments raised, the Commission takes the view that it is not necessary to undertake further work or seek further expert evidence in respect of this issue.

Issue 10: the general credibility of Darren Nicholls

243. The Commission substantively reviewed the evidence given by and the credibility of Mr Nicholls when first it considered this case and before issuing its provisional decision in respect of this application, see paragraphs 159-164, above. The applicants have made further submissions in respect of the credibility of Mr Nicholls, alleging that

he lied in order to frame them for the murders.

244. The Commission has carefully considered the further submissions which the applicants have made, but remains of the view that those submissions are not substantively new. Certainly, the Commission is satisfied that none of the matters which the applicants have raised is capable of undermining any of the reasons given by the Court of Appeal (in 2006) for upholding these convictions notwithstanding the emergence of evidence in respect of Mr Nicholls' arrangements with the media. In a specific and detailed judgment, dealing primarily with the evidence and credibility of Mr Nicholls, the Court came to the "firm conclusion" that Mr Nicholls' contact with the media had not undermined the safety of the convictions of the applicants. In particular, the Court noted that³:

- The key details of Mr Nicholls' account had been given to police before any contact with the media;
- Mr Nicholls' testimony was consistent on the important and incriminating details, and remained so under intensive cross-examination by defence counsel over the course of some three weeks during trial;
- The defence used their opportunity to present a clearly negative portrayal of Mr Nicholls to the jury. The jury were aware of Mr Nicholls' past and his manipulative nature. The evidence of Mr Nicholls' contact with the media could not have significantly enhanced this portrayal;
- The jury were prepared to dismiss Mr Nicholls' account on the firearms charge against Mr Steele, but were nevertheless "utterly convinced" by his evidence concerning the murders;
- There existed substantial other evidence in the case which supported aspects of Mr Nicholls' account.

245. The Commission remains of the view that there is no new evidence or argument which might undermine the rationale adopted by the Court of Appeal or otherwise give rise to a real possibility that the Court of Appeal might now conclude that Mr Nicholls' evidence could not safely have been relied upon.

Issue 11: Statement S177

246. The circumstances surrounding the creation of this HOLMES document have already been considered during the course of the Commission's review. The Commission concluded, at paragraphs

³ 2006 judgment para 35

143-150 above, that there was no evidence of bad faith on the part of Essex Police and that in all probability S177 referred to a record which was re-assigned or corrected to another part of the overall investigation. Despite the applicants' submissions that this anomaly ought properly to be regarded as evidence of malpractice or misfeasance on the part of Essex Police, the Commission remains of the view that the explanation given is reasonable and that there is no evidence of misconduct. The Commission cannot identify any further work that should properly be done in this regard. The Commission remains of the view that the explanation offered for S177 is credible. Accordingly, the Commission considers that the absence of document S177 does not provide any assistance to the applicants in discrediting Mr Nicholls' evidence or identifying bad faith on the part of Essex Police. There is no real possibility that the Court of Appeal would quash these convictions on the basis of any argument which might be extrapolated from the absence of S177.

Issue 12: Contrast between Mr Nicholls and other witnesses; the evidence of Mr Wright

247. The applicants argue that the evidence given by Sarah Earp was inconsistent with that of Mr Nicholls, specifically with regard to her observation of a parked VW Passat. Mr Steele asserts, furthermore, that DC Brown, the interviewing officer who took Miss Earp's statement, influenced her evidence by mentioning the features of the car. The Commission has examined Miss Earp's statements and transcripts of her evidence at trial. The Commission observes that her evidence was subject to detailed and extensive cross-examination by defence counsel. Consequently, the jury were aware of the disparity between her evidence and that of Mr Nicholls. Moreover, it was highlighted that she had not seen any driver present in the parked vehicle, despite the car being illuminated by nearby lights. The Commission therefore takes the view that this argument is not new; it could not form the basis of a reference back to the Court of Appeal in this matter.

248. It is further argued that the witnesses identified by the applicants and/or those who gave or could allegedly give evidence in the applicants' favour should be regarded as more credible than Mr Nicholls, and by extension that their evidence should displace his, on the basis that Mr Nicholls has a long and serious criminal record. The applicants maintain that the witnesses they have identified (particularly Mr Wright) are of good character. They go on to argue that, as a result, the Court of Appeal is under a duty to receive their evidence.

249. The Commission considered Mr Wright's potential evidence in detail at paragraphs 45-55, above. In concluding that there was no real possibility that the Court of Appeal would receive his evidence, the Commission commented on the limited assistance that Mr Wright's evidence could offer the defence case and identified inconsistencies between his evidence and that of his wife. The Commission further commented on the link between television footage of the case and the emergence of Mr Wright as a witness.

250. The Commission's conclusions are now challenged on the basis that:

- Mr Wright specifically identified the Range Rover as that which was driven by the victims;
- Although none of the victims was wearing a white top, as identified by Mr Wright, Mr Raymond Wright, who was a prosecution witness at trial, also wrongly said that one passenger had been wearing a "pale top", but was nonetheless said to be a credible witness;
- Mr Wright does not have any motive to fabricate evidence;
- Inconsistencies between Mr Wright and his wife are the natural result of memory loss and/or differences of perception. Consequently, they should not be used to discredit the new evidence;
- The Commission wrongly described the Range Rover as turning "west" at the Rettendon Turnpike rather than "east".

251. The thrust of the further submissions in this connection would appear to be an attempt to undermine some of the many individual reasons which together drove the Commission to conclude (at paragraphs 51- 55, above) that there was no real possibility that the Court of Appeal would now admit evidence from Mr Wright (or from his wife, Sharon Wright or Mr Graham Townes).

252. With the exception of the observation that the Commission wrongly described the direction of travel (which is considered below), the further submissions which the applicants have made in this connection concern the Commission's observations as to matters likely to be taken into account by the Court of Appeal in assessing the credibility of Mr Wright's evidence. The Commission observes, however, that this was not the basis on which the Commission took the view that there was no real possibility that the Court of Appeal would receive the evidence. Rather, the Commission concluded that there was no real possibility that this evidence might give rise to arguable grounds on which an appeal might be allowed, because, in summary:

- The vehicle described had already passed the entrance to

Workhouse Lane and would have had to follow an improbably convoluted route to arrive where the victims' vehicle was discovered;

- If the vehicle observed by Mr Wright was that in which the victims were travelling, it was remarkable that there was no evidence as to the activities of the victims in the hours between the suggested time of death and the time Mr Wright saw the vehicle. There was a period of some hours between the last telephone or personal contact with any of the victims and Mr Wright's encounter with a Range Rover, during which time the victims failed to attend a dinner they had arranged and made no attempt to explain their whereabouts;
- There were doubts about the accuracy of details recorded in Mr Wright's statement.

253. To the extent that the applicants have made representations in respect of Mr Wright's credibility, the Commission observes that the Court might legitimately doubt the credibility of Mr Wright's account without doubting his honesty. Specifically, the Court might regard as plausible the evidence of Mr Wright and Mr Townes that they were involved in an incident with a Range Rover in Rettendon at approximately midnight one night in December 1995 but nonetheless conclude that the argument that this was the vehicle in which the victims were travelling was not credible. Specifically, Mr Wright, Mrs Wright and Mr Townes each said that they had been aware of the Rettendon enquiry at the material time and that they had not reported the incident they described to that investigation because they had not at that time regarded the incident as being relevant to the enquiry.

254. The Commission recognises the inaccuracy in the summary given at paragraph 53 of the Provisional Statement of Reasons as to the direction in which the Range Rover was travelling. The Commission acknowledges this typing error and observes that the relevant passage goes on accurately to identify the route which the vehicle would need to have followed in order to reach Workhouse Lane. The relevant word has since been corrected.

255. In light of the foregoing, the Commission takes the view that none of the matters now raised undermines to any significant degree, if at all, the reasoning set out at paragraphs 51-55, above. Accordingly, the Commission remains of the view that there is no real possibility that the Court of Appeal might conclude that Mr Wright's evidence would give rise to a ground on which an appeal might be allowed in the context of all of the other evidence in this case.

256. In respect of the character of the witnesses identified by the applicants generally, the Commission observes that a witness's

criminal record is not a bar to his or her being heard by the Court and that a witness's good character does not give rise to an assumption that he or she will be permitted to give evidence. Certainly, the Commission could not make a reference on the basis simply that persons of good character are prepared to give evidence on behalf of the applicants. The Commission would have to be satisfied that those persons had relevant and admissible evidence to give and that such evidence might give rise to a real possibility that the Court of Appeal would quash these convictions. For the avoidance of doubt, in respect of all of the witnesses identified by the applicants, the Commission is not so satisfied.

Issue 13 Jury impact test

257. The applicants have submitted that it is for the Court of Appeal, and not the Commission, to decide on the impact that Mr Wright's evidence might have had on the trial jury. It is argued, therefore, that the fact that Mr Wright is willing to give evidence on their behalf is sufficient of itself to justify a reference to the Court of Appeal. It is said that, in making its decision, the Commission should consider the effect upon the original jury, rather than acting as a new and independent tribunal of fact. It is argued that this is the effect of the decision of the House of Lords in *R v Pendleton* [2002] 1 WLR 72.
258. The Commission observes that, in accordance with the statutory test which it is bound to apply, it must assess new evidence or information in line with the Court of Appeal's own criteria and, additionally, assess the chances of success of any putative ground of appeal before the Court. This necessitates an assessment of the Court's approach to similar types of evidence and/or argument. Whilst the Commission recognises that the House of Lords in *Pendleton* indicated that the Court might test its own view by considering the potential effect of new evidence on the trial jury, the Commission observes in *R v BurrIDGE* [2010] EWCA Crim 2847, the Court of Appeal pointed out that the House of Lords had "rejected the proposition that the jury impact test was determinative" and explained that "it was only a mechanism in a difficult case for the Court to 'test its view' as to the safety of a conviction"⁹.
259. Based on the most recent case law, the Commission observes that the Court will consider fresh evidence in the context of the case as a whole, without speculating about the perceptions of the original jury. The recent case of *R v Noye* [2011] EWCA Crim 650 included reference to the Privy Council decision in *Dial and another v State of Trinidad and Tobago* [2005] 1 WLR 1660, specifically Lord Brown's

observation that:

"The law is now clearly established and can simply be stated as follows. Where fresh evidence is adduced on a criminal appeal it is for the Court of Appeal, always assuming that it accepts it, to evaluate its importance in the context of the remainder of the evidence in the case...The primary question is for the court itself and is not what effect the fresh evidence would have had on the mind of the jury"^{4 5}.

260. The Court approved this principle, noting that it has been "consistently followed in this court" and explaining the way in which fresh evidence was to be considered

"The responsibility therefore rests with this court. In reaching our decision we reflect on how best to examine the fresh evidence and its possible impact on the safety of the conviction, and test our analysis to ensure that we have reached the right conclusion"⁶

261. Having considered the foregoing, the Commission is not persuaded that it should depart from its previous conclusions on this issue. Consequently, the Commission remains the view that there is no real possibility that the Court of Appeal would receive evidence from Mr Wright and, therefore, that his evidence is not capable of giving rise to any real possibility that the Court of Appeal might quash these convictions.

Issue 14: the Commission has not considered the potential evidence of PC Truss properly or at all.

262. At paragraph 178 above, the Commission summarised the applicants' contentions in respect of PC Truss and concluded that there was no basis on which to conclude that evidence capable of assisting this application might arise were the Commission to locate and interview this officer. Although the applicants disagree with the Commission's conclusion, no new evidence or argument has been presented and the Commission remains of the same view.

Issue 15: police corruption/misfeasance

263. The applicants have made a number of allegations against Essex Police, the majority of these involving aspects of the evidence which have already been addressed above. The Commission now addresses those allegations which are not linked to telephone data

⁴ Burridge, para 101

⁵ Noye, para 27

⁶ Para 31

or the handling of Mr Nicholls.

264. The applicants and their legal representative have raised three such points in further submissions. These can be summarised as follows:

- Officers Barrington and Bright were aware of the murders prior to discovery of the crime scene;
- The Commission has been compromised by a conflict of interest between its review of the applicant's case and its employment of Mr Barrington as an adviser;
- DC Brown has rewritten his diary and therefore committed perjury by presenting false evidence;

265. The Commission observes that these submissions have already been considered during this review. In addition, with the exception of Mr Barrington's employment at the Commission, these matters have also already been considered by the Court of Appeal. Nothing new has been presented that has not been dealt with in the Commission's analysis at paragraphs 174-175, above. For the purpose of clarification, the Commission expressly acknowledges that Mr Barrington was employed as an investigations adviser with the Commission from 1997 to 2011, but stresses that Mr Barrington has had no involvement with any review of the applicants' cases. In line with the Commission's policy, every precaution was taken to ensure the independence and objectivity of the applicants' reviews. It is the Commission's view that a submission which relies upon Mr Barrington's alleged involvement with this review is incapable of leading to a ground of appeal with any real possibility of success.

266. Mr Bowen, in a document emailed to the Commission on 20th July 2011, makes numerous allegations of bad faith against the police in respect of the HOLMES database created during this investigation. Mr Bowen has also requested disclosure of various messages and actions relating to the original investigation. The thrust of Mr Bowen's submissions is that full disclosure of all of the documents collated on the HOLMES system might allow further arguments to be made in respect of the credibility of Mr Nicholls' evidence. The Commission has already considered the proposition that Mr Nicholls' evidence was dishonestly obtained and was fabricated. The Commission has conducted exhaustive enquiries and has found no evidence to support this proposition. In the circumstances, the Commission can see no good reason to disclose any further material to Mr Bowen. Put simply, having thoroughly interrogated the HOLMES records for this case, the Commission is satisfied that none of the undisclosed information held on HOLMES needs to be disclosed in order to allow the applicants to make their best case for a referral by the Commission.

267. Mr Bowen seeks also to rely on R v Maxwell [2009] EWCA Crim 2552

in support of the proposition that a reference should be made based on serious prosecutorial misconduct (reliance is similarly placed on *R v Smith (Matthew)* [2004] EWCA 2212, although this authority predated the 2006 appeal). Put simply, Mr Bowen appears to argue that the applicants' convictions were secured against a factual background so similar to that in *Maxwell* that there must be a real possibility that the Court of Appeal would now quash their convictions.

268. The Commission notes that there is, superficially, a degree of similarity between the applicants' case and *Maxwell* in that both cases relied on the evidence of a prosecution witness who was involved, at least peripherally, in the events about which he gave evidence. In the Commission's assessment, however, there are no other relevant similarities. The Commission observes that the Supreme Court described the background in *Maxwell* in the following terms:

"9. ... The findings of the report, which have not been challenged, reveal that the police systematically misled the court, the CPS and counsel by concealing and lying about a variety of benefits received by Chapman and his family. These included not only financial reward, but, inter alia, visits to brothels and permission to consume drugs in police company. Furthermore, allegations of violent attacks by Chapman were not investigated, still less the subject of prosecutions. The clear conclusion of the investigation by North Yorkshire Police was that a number of senior police officers involved in the Smales investigation had conspired to pervert the course of justice. They had deliberately concealed information from the court; they had colluded in Chapman's perjury at trial; they had lied in response to enquiries following conviction; and they had perjured themselves in the ex parte leave hearing in the Court of Appeal. It was in the light of its findings that on 25 November 2008 the CCRC referred the case back to the Court of Appeal."

269. The circumstances in which Mr Nicholls came to give evidence in the applicants' case could not, in the Commission's assessment, be similarly described. During the course of its extensive review of this matter the Commission has found no evidence that there was in the applicants' case any misconduct either by the police or prosecutors. Accordingly, the Commission does not consider that *Maxwell* provides any assistance to Mr Corry.

Decision

270. The Commission has decided not to make a reference and this statement sets out the Commission's reasons in accordance with section 14(6) of the Act. This decision has been made by a committee of three Commissioners and is signed by one of the committee on behalf of the Commission.

Signed:

Date:

J England

Committee:

J England

A MacGregor

I J Nichol

Annex A

Summary of the Referral Powers of the Commission

1. Under sections 9 to 12 of the Criminal Appeal Act 1995, where a person has been convicted on indictment or by a magistrates' court in England and Wales or Northern Ireland, the Commission may at any time refer the resulting conviction, verdict, finding or sentence to the Court of Appeal, Crown Court or County Court as appropriate.
2. By section 13 of the Act, a reference shall not be made unless the Commission consider that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made.
3. By the same section, this consideration must be reached because of argument, evidence or, in the case of a sentence, argument on a point of law or information, not raised in the proceedings which led to the conviction or any appeal or application for leave to appeal.
4. A reference shall not be made unless an appeal has been determined or an application for leave to appeal has been refused.
5. In exceptional circumstances, the Commission may refer a case where there has been no previous appeal or application for leave to appeal.
6. In exceptional circumstances, the Commission can also refer a conviction, verdict or finding (but not a sentence) even if the evidence or argument upon which the reference is based, has been raised previously before the trial court or on appeal.

Annex B

Disclosure by the Commission

1. The Commission has a legal duty to disclose any material that it has obtained during its review which would help the applicant to make his best case for a reference to the Court of Appeal. The material may be sent to the applicant in its original form, or as an extract or it may be summarised in the Statement of Reasons.
2. The Commission may, in its discretion, provide other material where it considers it appropriate.
3. The following material has been disclosed to Mr Whomes and his representative in the course of the review:
 - Expert report of forensic meteorologist Adrian Runacres (dated 20th April 2010);
 - Results of forensic testing of exhibits PSB/43 and PSB/44, carried out by Dr James Luck, Senior Technologist at the Metropolitan Police Digital & Electronics Forensic Service (19th April 2010);
 - Documents from HMCS regarding Mr Nicholls' court appearances (under cover of letters dated 25th September 2009 and 26th October 2009);
 - Redacted bail notice (dated 12th July 1996).
4. The following material was disclosed to Mr Whomes and his representative with the Provisional Statement of Reasons:
 - Witness statement by Sharon Teresa Wright (dated 29th January 2008);
 - Witness statement by Graham Kim Townes (dated 26th March 2008);
 - Internet article entitled "Don't Let Word Get You Down, With 'Error! Reference Source Not Found!'" (dated 5th October 2007).